(19)

No. 94-286-CFX
Status: GRANTED

Title: Freightliner Corporation, et al., Petitioners
v.
Ben Myrick, et ux., et al.

Docketed:
August 15, 1994

Court: United States Court of Appeals for
the Eleventh Circuit

Counsel for petitioner: Fried,Charles, Bryant,Arthur H.

Counsel for respondent: Bryant,Arthur H., Roffman,Allan R.,
Mathis,Charles

Entry	Date	Note	Proceedings and Orders
1	Aug 15 1994	G	Petition for writ of certiorari filed.
2	Sep 15 1994	G	Motion of American Trucking Associations, Inc. for leave to file a brief as amicus curiae filed.
3	Sep 19 1994	G	Motion of Truck Trailer Manufacturers Association for leave to file a brief as amicus curiae filed.
4	Sep 19 1994		Brief of respondents Ben Myrick, et ux., et al. in opposition filed.
5	Sep 21 1994		DISTRIBUTED. October 7, 1994 (Page 15)
6	Sep 22 1994	X	Reply brief of petitioners filed.
7	Oct 7 1994		Motion of American Trucking Associations, Inc. for leave to file a brief as amicus curiae GRANTED.
8	Oct 7 1994		Motion of Truck Trailer Manufacturers Association for leave to file a brief as amicus curiae GRANTED.
9	Oct 7 1994		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, November 16, 1994. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 13, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 29, 1994. Rule 29.2 does not apply.
			**********
10	Nov 7 1994		Record filed.
		*	Original record proceedings U.S. Court of Appeals, Eleventh Circuit and U.S.District Court, N.Dist. Georgia(BOX)
11	Nov 16 1994		Joint appendix filed.
12	Nov 16 1994		Brief of petitioner Freightliner Corporation filed.
13	Nov 16 1994		Brief amicus curiae of Truck Trailer Manufacturers Association filed.
14	Nov 16 1994		Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
15	Nov 16 1994		Brief amici curiae of American Automobile Manufacturers Association, et al. filed.
16	Nov 16 1994		Brief amici curiae of American Trucking Association, Inc., et al. filed.
17	Dec 1 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Dec 12 1994		Motion of the Solicitor General for leave to participate

No. 94-286-CFX

Entry	Date	Note	Proceedings and Orders
			in oral argument as amicus curiae and for divided argument GRANTED.
23	Dec 12 1994		Brief amicus curiae of Institute for Injury Reduction filed.
19	Dec 13 1994		Brief of respondent Ben Myrick, et ux., et al. filed.
20	Dec 13 1994		Brief amici curiae of National Conference of State Legislatures, et al. filed.
21	Dec 13 1994		Brief amicus curiae of Association of Trial Lawyers of America filed.
22	Dec 13 1994		Brief amicus curiae of Public Citizen, Inc. filed.
24	Dec 13 1994		Brief amicus curiae of United States filed.
25	Dec 13 1994		LODGING consisting of two sets of two letters submitted by the Solicitor General.
26	Dec 21 1994		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 22, 1995.(1ST CASE)
27	Dec 21 1994		CIRCULATED.
28	Dec 29 1994	X	Reply brief of petitioners filed.
29	Jan 31 1995		LODGING BY PETITIONERS. 20 copies of §571.121 Standard No. 1221; Air Brake Systems, 49 CFR Ch. V (10-1-93 Edition)
30	Feb 22 1995		ARGUED.

FILED

No. 94-286 AUG 15 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,

v.

BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,

v.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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82 pp

QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act preempts state common-law standards that conflict with federal standards adopted pursuant to the Act for reasons of safety and practicability; or whether, as the Eleventh Circuit held, one sentence in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992), forecloses such preemption.

RULE 29.1 STATEMENT

Petitioner Freightliner Corporation has no subsidiaries other than wholly owned ones. Freightliner owns a 20% interest in KCSI, Inc. Its parent corporations are Daimler-Benz North America Corporation and Daimler-Benz A.G. Petitioner Navistar International Transportation Corp. is a subsidiary of Navistar International Corporation. Navistar International Transportation Corp. owns more than 99% of Grimsby Insurance Co., Ltd., which is not publicly traded.

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NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Freightliner Corporation and Navistar International Transportation Corp. hereby petition for a writ of certiorari to review the judgment of the Eleventh Circuit in this case. Based on its reading of *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Eleventh Circuit held that the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recently recodified at 49 U.S.C. §§ 30101-30169), does not

preempt a state common-law determination that motor vehicles are defectively designed if they lack antilock brakes, even though specific federal regulations on the subject, on grounds of safety and practicability, explicitly provide that such brakes are not required.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 13 F.3d 1516. The opinion of the district court granting Freightliner summary judgment against the Myrick respondents (Pet. App. 34a-42a) is reported at 795 F. Supp. 1139. The opinion of the district court granting Navistar summary judgment against respondent Lindsey (Pet. App. 46a-47a) is unreported.

JURISDICTION

The court of appeals entered judgment on February 11, 1994. Pet. App. 1a. Rehearing was denied on May 18, 1994. Pet. App. 49a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act, as codified at all times relevant to this case, provided in pertinent part:

15 U.S.C. § 1392

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

* * * *

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in

effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * *

(f) In prescribing standards under this section, the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * * *

15 U.S.C. § 1397

(k) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in relevant part, are as follows:

49 U.S.C. § 30103. Relationship to other laws

(b) PREEMPTION.—(1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * *

(e) COMMON LAW LIABILITY.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

* * * *

49 U.S.C. § 30111. Standards

(a) GENERAL REQUIREMENTS.—The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.

(b) CONSIDERATIONS AND CONSULTATION.—When prescribing a motor vehicle safety standard under this chapter, the Secretary shall—

(1) consider relevant available motor vehicle safety information;

(2) consult with the agency established under the Act of August 20, 1958 (Public Law 85-684, 72 Stat. 635), and other appropriate State or interstate authorities (including legislative committees);

(3) consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which the standard will carry out section 30101 of this title.

STATEMENT

A divided court of appeals held, contrary to the law in other federal and state appellate courts, that state common law is outside the preemptive reach of the National Traffic and Motor Vehicle Safety Act regardless of any actual conflict it may present with federal law. In particular, the court ruled that a State, as long as it acts through its common law, may require a motor vehicle manufacturer to adopt a particular safety measure on an aspect of performance specifically addressed by federal regulations, where the regulations explicitly consider that measure and, on grounds of safety and practicability, declare that it is not required. The court rested this holding on its view that one brief passage in the Court's opinion in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), radically altered traditional methods of interpreting the preemptive reach of federal law. This petition asks this Court to review the Safety Act ruling and the interpretation of *Cipollone* on which it rests.

A. Federal Law Background

The National Traffic and Motor Vehicle Safety Act, enacted in 1966, directs the Secretary of Transportation —now through his delegee, the National Highway Transportation Safety Administration (NHTSA)—to regulate motor vehicle safety by promulgating national safety standards. 15 U.S.C. § 1392. (For convenience, we cite to the codification used in the courts below and in all of the opinions on the issue.) The statute provides that the standards "shall be practicable, shall meet the need for motor vehicle safety and shall be stated in objective terms." *Id.* § 1392(a). *See also id.* § 1392(f)(3). It provides specifically for States to play a consultative role in the agency's standard-setting process. *Id.* § 1392(f)(2). Once a standard is set, however, the statute mandates national uniformity (*id.* § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

That preemption provision is immediately followed by two exceptions allowing States to enforce standards on safety matters covered by federal regulations—where the state standard is identical to the federal standard and where vehicles used by the state government itself are involved. *Id.* § 1392(d). A subsequent provision of the Act adds: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

Exercising its statutory responsibility, NHTSA has issued safety standards addressing many aspects of vehicle design and performance. The regulation at issue in this

case governs safety relating to stopping—specifically, the performance of truck air brake systems, 49 C.F.R. § 571.121 (Standard 121). That regulation went through several stages, ultimately resulting in a deliberate choice by the agency *not* to require antilock brakes for trucks.

As originally promulgated, NHTSA's regulation required vehicles to stop within certain distances, at specified speeds, without any significant lockup. *See* 35 Fed. Reg. 10368 (1970). The effect was to require all truck manufacturers to equip their vehicles with antilock brake systems. *See Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632, 639 n.26 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). The regulation was challenged on the ground that, rather than promoting safety, it increased the danger of accidents and therefore was not reasonable or practicable (15 U.S.C. § 1392(a), (f)(3)) in light of present technology. The Ninth Circuit agreed with the challenge and suspended the requirement for trucks until NHTSA could find that such systems could be reliably produced:

> [T]he comprehensive data before us indicate that there is a strong probability that the performance of a substantial number of vehicles whose braking systems have been altered to include . . . antilock devices has created a potentially more hazardous highway situation than existed before the Standard became operative. Therefore, until such time as NHTSA develops evidence that the new braking systems required by the Standard do not create the possibility of greater danger to the public, those parts of the Standard requiring . . . the antilock device should be suspended.

Paccar, 573 F.2d at 643; *see id.* at 639.

The agency responded by revising its regulation to add a specific statement that antilock-brake and related requirements were not applicable to trucks and trailers. *See* 44 Fed. Reg. 46849 (1979); 44 Fed. Reg. 53166 (1979);

44 Fed. Reg. 57100 (1979). The agency left in place the performance criteria for those manufacturers who chose to install antilock brakes. *See* 44 Fed. Reg. 46849 (1979). Trucks were then and are now subject to many standards for airbrake systems and safety in stopping, of course, but the regulations have at all times relevant to this case contained the explicit provision, based on safety and practicability considerations, declaring installation of antilock brakes not to be required. Standard 121 § S3 (regulations requiring antilock brakes "are not applicable to trucks and trailers").[1]

B. This Litigation

This case involves two separate but materially identical tort actions. Respondent Ben Myrick was injured in a collision with a tractor-trailer in Georgia. He and his wife, respondent Emily Myrick, brought an action in a Georgia state court against Freightliner, the manufacturer of the tractor.[2] Respondent Jack Lindsey's wife was killed in a collision with a tractor-trailer. As executor and surviving spouse, Lindsey then brought a state-court action against Navistar, whose corporate predecessor had

[1] In 1990 NHTSA announced its intention to consider reinstatement of the antilock-brake requirement, in light of technological advances. *See* 55 Fed. Reg. 44738 (1990). In June 1992, the agency issued an advance notice of proposed rulemaking to achieve that result. *See* 57 Fed. Reg. 24212 (1992). At present, however, the regulation has not been modified: it still expressly makes the use of antilock brakes an option, rather than a requirement, for the manufacturer.

As noted below, the Eleventh Circuit's ruling in this case is in no way limited to the particular antilock-brake regulation, but by its terms deprives *any* NHTSA safety standard, present or future, of preemptive effect against any common-law standards, no matter how inconsistent with federal standards.

[2] The suit also named Freuhauf Corporation, a trailer manufacturer, but the case against Freuhauf was dismissed with prejudice by agreement. Pet. App. 3a n.1. Freuhauf is no longer a party to the case.

manufactured the tractor. Both suits were removed to federal court in Georgia based on diversity jurisdiction. 28 U.S.C. §§ 1332, 1441.

Both actions alleged liability under Georgia law, based entirely on the lack of antilock brakes. In the court of appeals' words, the Myricks "alleg[ed] that the absence of anti-lock brakes was a negligent design and rendered the tractor defective." Pet. App. 3a (footnote omitted). Similarly, Lindsey "alleged that Navistar's failure to supply anti-lock brakes was a negligent design which rendered the tractor defective and unsafe." *Id.* at 3a-4a.

Petitioners moved for summary judgment in each case on the ground that, since the federal regulation on braking systems makes the use of antilock brakes optional, the Safety Act preempts state tort law claims alleging that the absence of such brakes is a defective design. The district court in each case agreed. In the *Myrick* case, Judge Forrester concluded:

> Not only would a common law standard requiring the installation of antilock devices conflict with the federal standard, it would defeat the policy behind the Safety Act by imposing a design requirement that the Department of Transportation judged to be unsafe, having chosen not to require such devices until they are more reliable.

Pet. App. 41a. In the *Lindsey* case, Judge Shoob adopted Judge Forrester's reasoning as "persuasive." Pet. App. 47a.

C. The Court of Appeals Decision

The court of appeals, in a 2-1 decision, reversed. Pet. App. 1a-33a. The majority explained that the Eleventh Circuit had held in *Taylor v. General Motors Corp.*, 875 F.2d 816 (1989), *cert. denied*, 494 U.S. 1065 (1990), that the Safety Act preempted a common law tort action for failure to install a safety device (there, air bags) that

the federal regulations on the subject specifically said was not required. Pet. App. 2a. And it recognized that *Taylor* was indistinguishable from the present case. *See id.* at 10a ("In both cases, the claims were premised on a failure of the manufacturers to install specific safety devices in their vehicles, and in both cases a safety standard established under the Act effectively gave the manufacturers the option of not installing the device."). The panel majority concluded, however, that *Taylor*'s preemption holding must be overruled in light of this Court's decision in *Cipollone*. *Id.* at 2a, 11a.

The majority rested its conclusion on a rigid division between express and implied preemption and on one sentence from *Cipollone* (112 S. Ct. at 2618), which it read as adding "a new wrinkle to the fabric of pre-emption law by holding that where a federal statute contains an express pre-emption clause, and that clause 'provides a "reliable indicium of congressional intent with respect to state authority," ' a court should not consider implied theories of pre-emption." Pet. App. 9a-10a; *see also id.* at 14a ("we hold today: where, as here, there is an express pre-emption provision, which constitutes a reliable indicium of congressional intent, implied pre-emption analysis has no place"). Finding that principle applicable to the Safety Act, because "the reliable indicium requirement is not much of a hurdle" (*id.* at 18a), the court restricted itself to "express preemption" analysis. *Id.* at 10a-11a, 19a-20a. With respect to the text of the Safety Act, then, the panel did not dispute—what is not seriously disputable since *Cipollone*—that the preemption clause of the Act, read by itself, would preclude state common-law standards differing from federal regulatory standards.[3]

[3] This Court recently made just this point with respect to a pre-emption provision that, without specific mention of "common law," covered any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434. The Court said: "Legal duties imposed on railroads by the common law fall within the

The court concluded, however, that the "savings clause" in a separate provision of the Safety Act, 15 U.S.C. § 1397(k), required a different result, saving common law claims even if, as here, they would conflict in precisely the way the *Taylor* court had held forbidden. Pet. App. 24a; *see also id.* at 20a-22a (insisting on reading preemption and savings clauses together).

Judge Hill dissented, explaining (Pet. App. 33a (footnote omitted)):

> [T]he effect of a prevailing claim of common law negligence for failure to equip the trucks with antilock brakes would be the same as if the State of Georgia enacted a statute saying that a manufacturer cannot sell for use in Georgia any truck without antilock brakes. As noted above, Standard 121 expressly permits manufacturers to install airbrake systems on trucks and trailers. If the Supremacy Clause means anything, it must mean that federal law prevails in this conflict.

The Eleventh Circuit subsequently denied rehearing (Pet. App. 48a-49a), but it stayed the issuance of the mandate to permit Freightliner and Navistar to file this petition (*id.* at 50a-51a).

REASONS FOR GRANTING THE PETITION

Until the decision by the Eleventh Circuit in this case, it was well settled in the courts of appeals that a State may not impose a safety standard through a common-law determination of defective design when federal regulations on the same aspect of motor-vehicle performance have explicitly determined, on grounds of safety and practicability, that such a standard shall not be required. The decision below squarely rejects that proposition, which remains the law in several other circuits and States. In-

scope of these broad phrases." *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) (citing to *Cipollone*).

deed, the decision expressly allows all state common-law standards, no matter how starkly inconsistent they may be with federal standards adopted under the Safety Act. The decision thereby creates a sharp conflict on this obviously recurring and important issue, freeing each State in the Eleventh Circuit (through its juries) to require antilock brakes, air bags, or other safety features that the federal government, in setting safety standards under the Act, has specifically rejected on grounds of safety and practicability.

The court of appeals felt compelled to breach the consensus on this issue by its reading of one passage from this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). But that reading of *Cipollone* is incorrect, as other circuits have recognized. And in any event, what is critical for present purposes, this reading provides no basis for speculating that the clear present appellate-court conflict on the Safety Act will eventually disappear by itself, without this Court's involvement. Indeed, state appellate courts and federal district courts have found preemption under the Safety Act since *Cipollone*. Moreover, in order to reverse themselves as the Eleventh Circuit has done, the federal circuits that found preemption before *Cipollone* would have to repudiate their express conclusions on two issues that cannot logically be affected by *Cipollone*: first, whether the Eleventh Circuit's dispositive principle, by which certain express preemption clauses preclude any implied preemption analysis, has application to the Safety Act; second, whether the "savings clause" of the Safety Act is properly construed, as the Eleventh Circuit held, expressly to save all common-law claims. This Court should take this case because the lower court conflicts are clear now and will predictably persist.

Beyond the conflicts, there can be no doubt about the importance of the issue presented. The Eleventh Circuit's ruling by its terms applies not just to the many accidents

plaintiffs may attribute to the absence of antilock brakes, and not just to the many injuries plaintiffs may attribute to the absence of air bags, but to any motor vehicle accident, in the past and into the future, where the plaintiff seeks a common-law standard inconsistent with federal law, as by requiring a safety measure that federal law on the same aspect of performance has specifically said, on grounds of safety and practicability, is not required. Respondents' own counsel confirmed the impact of this ruling when he said that it now "would be foolish," indeed "below the standard of care" for attorney malpractice, if counsel for plaintiffs did *not* include a design-defect claim such as one challenging the omission of air bags. A. Grossman, "Auto Makers Liable for Lack of Airbags?" *Lawyers Weekly*, Mar. 14, 1994, at p. 1.

1. The Eleventh Circuit decision creates a sharp appellate-court conflict on the issue of Safety Act preemption. The leading and most comprehensive of the federal circuit decisions is the First Circuit's decision in *Wood v. General Motors Corp.*, 865 F.2d 395 (1988), *cert. denied*, 494 U.S. 1065 (1990). The court canvassed the language, purpose, and history of the Safety Act and concluded, directly contrary to the Eleventh Circuit holding here, that the Act preempted a state-law claim that was inconsistent with federal law—particularly, a claim of defect based on failure to provide a safety feature (air bags) specifically addressed, but made optional, by a federal standard.

The First Circuit recognized that the finding needed for the alleged design-defect liability would be "tantamount to announcing a state safety standard (vehicles must have air bags) that differs from the federal safety standard covering the same aspect of performance (viz., the relevant federal standard permits seat belts in lieu of air bags)." *Id.* at 401. The court observed that "[s]uch a safety standard, if promulgated by state statute or regulation, would be preempted by the clear commands of section 1392(d)," which it noted, "says nothing about

being limited to *legislatively* established state standards." *Ibid.* The court concluded, however, that the "savings clause," 15 U.S.C. § 1397(k), while not preserving common law claims that "conflict with the relevant federal standard" (865 F.2d at 401, 402 (footnote omitted)), made it impossible to determine from the express statutory language, without more, that Section 1392 preempted the state tort action alleging defective design. *Id.* at 402. The court found no "express preemption" because "Congress did not, in the language of the Safety Act, make an explicit statement regarding preemption of state claims that create, in effect, a state design standard not identical to a federal standard." *Id.* at 407.

The First Circuit nevertheless concluded that "Congress's purposes, as revealed in the Safety Act and in the legislative history, plainly *imply* a preemptive intent." *Id.* at 402. Classing its analysis as one of "implied preemption" (*id.* at 407), the court undertook a full analysis of the logic of the Act and the legal context into which it had been placed upon enactment in 1966. It concluded, in particular, that because "Congress in 1966 did not contemplate the likelihood that there would be a state tort action that would effectively create a state design standard conflicting with a federal safety standard . . . as no reason appears in the legislative history or comes to mind as to why Congress would have meant to endorse a state claim having the same effect as a forbidden state regulation," it could not find "that Congress meant to sanction the 'tension' between the [Safety Act] and state common law existing in the current situation" (*id.* at 403). The court therefore followed this Court's direction in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), to "look to interference with Congress's chosen method as well as to the ultimate goal of the statute." 865 F.2d at 408. Under the Safety Act, that method would unquestionably preempt "a nonconforming . . . *regulation* issued by the Massachusetts legislature or state or local agency" and "the effect [of the tort action] would be similar," because

" 'regulation can be as effectively exerted through an award of damages as through some form of preventive relief.' " *Id.* at 408, 409, 410 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

The First Circuit's decision in *Wood* was subsequently followed by the Tenth Circuit in *Kitts v. General Motors Corp.*, 875 F.2d 787 (1989), *cert. denied*, 494 U.S. 1065 (1990), which briefly explained: "[f]or our purposes, *Wood* is almost identical to the cases before us" and "correctly resolves the issue before us." *Id.* at 789. The Third Circuit reached the same conclusion, though in a lengthier opinion. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, *cert. denied*, 498 U.S. 853 (1990). The court explained that "common law liability for the failure to install air bags or automatic safety belts would directly undermine the regulatory framework" under the Act by effectively destroying the option provided in the federal standard. *Id.* at 1124-25. The tort action was therefore impliedly preempted, and "a savings clause like § 1397 (k) does not 'save' common law actions that would subvert a federal statutory or regulatory scheme." *Id.* at 1125.

Various state appellate courts and federal district courts have reached the same conclusion (using somewhat varying analyses). *See, e.g., Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Meier v. Nissan Motor Co.*, 261 Cal. Rptr. 80 (Ct. App. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Gardner v. Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), *appeal dismissed*, 543 N.Y.S.2d 401 (1989); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Miranda v. Fridman*, No. A-3651-92T1 (N.J. App. Div. July 21, 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Cox v. Baltimore County*, 646

F. Supp. 761 (D. Md. 1986); *Tammen v. General Motors Corp.*, No. 93-1477 (D. Kan. June 24, 1994); *Estate of Montag v. Honda Motor Co.*, 1994 U.S. Dist. LEXIS 9063 (D. Colo. 1994).

These decisions squarely conflict with the Eleventh Circuit decision in this case. The Eleventh Circuit readily agreed that the state common-law actions at issue here are inconsistent with federal law under the Safety Act in precisely the same sense, the ordinary "conflict" preemption sense, as the common-law actions were inconsistent with federal law in the foregoing (air bags) cases: in both situations, the state-law claim would defeat an option granted by federal law (Pet. App. 10a). That is why the Eleventh Circuit found it necessary to overrule its own prior *Taylor* decision in order to reach its conclusion of no preemption here. The Eleventh Circuit's holding—that there is no preemption of state common-law standards under the Safety Act, even when they concededly conflict with federal law—is directly contrary to all of the above-cited case law.[4]

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[4] In rejecting express preemption, the Eleventh Circuit in *Taylor* mentioned the absence of explicit reference to "common law" in Section 1392(d). *See* 875 F.2d at 824-25. The panel in this case nowhere repudiated this point; indeed, it declared itself bound by *Taylor*'s rejection of express preemption. Pet. App. 24a. The view that a preemption provision like Section 1392(d) does not cover common-law standards in the absence of a specific reference to "common law," aside from being patently incorrect (*see* note 3, *supra*), is inconsistent with the law in many other circuits. *E.g.*, *Mendes v. Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King v. Collagen Corp.*, 983 F.2d 1130 (1st Cir.), *cert. denied*, 114 S. Ct. 84 (1993); *King v. E.I. Dupont de Nemours & Co.*, 996 F.2d 1346 (1st Cir.), *cert. dismissed*, 114 S. Ct. 490 (1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Stamps v. Collagen Corp.*, 984 F.2d 1416 (5th Cir.), *cert. denied*, 114 S. Ct. 86 (1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993).

2. Resolution of these clear conflicts should not be postponed to await possible action by the lower courts to dissolve the conflicts themselves. Not only would delay impose unwarranted costs and uncertainty of potentially enormous magnitude, but there is nothing but speculation to support the possibility that *all* of the many courts that have found preemption will now change course and agree with the Eleventh Circuit that *Cipollone* mandates a finding of no preemption. In fact, any such speculation is worse than unsupported; it is highly implausible.

First, several courts have already found preemption under the Safety Act since *Cipollone*. *Boyle v. Chrysler*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Miranda v. Fridman*, No. A-3651-92T1 (N.J. App. Div. July 21, 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Tammen v. General Motors Corp.*, No. 93-1477 (D. Kan. June 24, 1994); *Estate of Montag v. Honda Motor Co.*, 1994 U.S. Dist. LEXIS 9063 (D. Colo. 1994).[5] This alone shows the unlikelihood of the widespread overruling of binding precedent that would be needed for all the lower courts to bring themselves into alignment with the Eleventh Circuit.

Second, each of the leading federal circuit decisions has already rejected at least one premise that is both necessary to the Eleventh Circuit's ruling and wholly unaffected by *Cipollone*. In particular, the First Circuit decision in *Wood*, on which the Tenth Circuit relied in *Kitts*, specifically concluded that, even if there is a principle that some express preemption provisions exclude implied preemption analysis, that principle is *inapplicable* to the Safety Act. 865 F.2d at 414. And the First Circuit also specifically concluded that the "savings clause" of the Safety Act is *not* properly construed to save all common

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[5] Recently, a Missouri appellate court first found preemption and then changed its mind based on the Eleventh Circuit decision here. *Loulos v. Dick Smith Ford, Inc.*, 1994 Mo. App. LEXIS 852 (Mo. Ct. App. 1994). The case is still pending on appeal.

law claims, including those in conflict with federal law. 865 F.2d at 402. On this latter point, the Third Circuit in *Pokorny* agreed: "it is well-established that a savings clause like § 1397(k) does not 'save' common law actions that would subvert a federal statutory or regulatory scheme." *Pokorny*, 902 F.2d at 1125, citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (even broad savings clause does not save those common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act," since the statute cannot be read to "destroy itself"). The Eleventh Circuit's finding of no preemption necessarily and explicitly rests on the opposites of *both* of those propositions.

Neither of these two necessary steps in the Eleventh Circuit's reasoning could possibly be affected by *Cipollone*. With respect to the preemption principle the Eleventh Circuit found in *Cipollone*, the First Circuit *assumed* the validity of the principle, but then found it inapplicable to the Safety Act. *Wood*, 865 F.2d at 414 ("even if Wood's principle were correct, it would not apply in the present case"). With respect to savings clauses, *Cipollone* could not conceivably have changed the established law because the statute at issue did not involve a savings clause. Indeed, the traditional approach to savings clauses (*see Pokorny, supra*) was well established at the time Congress enacted the Safety Act (*see, e.g., Abilene Cotton*, 204 U.S. at 446), was followed by this Court only three weeks prior to its decision in *Cipollone* (*see Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992)), and was followed yet again last Term (*John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993) (a broad savings

clause would not be read to preserve a state law that otherwise undermined congressional objectives)).

3. Even if the specific bases of its decision had not already been rejected on grounds unaffected by *Cipollone*, the Eleventh Circuit's reading of *Cipollone* itself is so flawed that it is exceedingly unlikely that all of the circuits and state courts that have found preemption will now abandon their conclusions in light of *Cipollone*. The Eleventh Circuit, in overruling its prior *Taylor* decision, necessarily agreed with petitioners that the common-law actions at issue here are inconsistent, in the ordinary "conflict" preemption sense, with Standard 121 and the Safety Act: the state claims would defeat the option granted by federal law (Pet. App. 10a). The Eleventh Circuit nevertheless rejected preemption based entirely on its view that *Cipollone* meant, in a single sentence, to revolutionize preemption law for statutes containing preemption provisions by excluding all inquiry into whether particular state laws are consistent with the statute and regulations implementing it, read as a whole. But that view of *Cipollone* and of preemption law—which itself has been rejected by other circuits [6]—cannot be right.

To begin with, nothing in the *Cipollone* sentence that the Eleventh Circuit fixed upon hints that it is repudiating, as the Eleventh Circuit concluded, clear and repeatedly relied-on preemption principles. Pet. App. 5a-6a, 9a-11a. To the contrary, the Court in *Cipollone* said that it

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[6] In addition to the circuit-court cases cited at note 4, *supra*, and note 9, *infra*, see *Jackson v. Culinary School of Washington, Ltd.*, 1994 U.S. App. LEXIS 15602, *29 n.12 (D.C. Cir. June 24, 1994): "We do not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses altogether the possibility that state statutes in actual conflict can be preempted. The overriding focus of preemption analysis is on the intent of Congress. *See CSX Transp., Inc.*, [113 S. Ct. at 1737]; *Cipollone*, 112 S. Ct. at 2617. Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a 'reliable indicium of congressional intent with respect to state authority.' *Cipollone*, 112 S. Ct. at 2618."

was following a "familiar" principle—that an express preemption provision *may* define the outer limits of congressionally intended preemption.[7] Moreover, three Justices who were necessary to form a majority for this portion of the opinion (Chief Justice Rehnquist and Justices White and O'Connor) only one week earlier had specifically taken the very approach that the Eleventh Circuit found forbidden by *Cipollone,* concluding that a statute containing an express preemption provision "impliedly pre-empted" state law that was "in conflict with the full purposes and objectives" of the federal statute. *Gade v. National Solid Wastes Management Ass'n,* 112 S. Ct. 2374, 2383 (1992) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Scalia, J.). It cannot sensibly be assumed that these Justices meant in *Cipollone* to reject their own approach from the week before.

The Eleventh Circuit's reading of *Cipollone* is also at odds with what the Court has done since. The very next Term, the Court made clear in *CSX* that the "plain wording" of a preemption clause was to be looked to "in the first instance" (113 S. Ct. at 1737), but not exclusively. Rather, the standard remained one of "pre-emptive purpose" to be "sought in the text *and structure* of the statute at issue." *Ibid* (emphasis added). Indeed, after the Court concluded that one state-law claim was not expressly preempted, based in part on consideration of the scheme as a whole (*id.* at 1739-40), the Court addressed implied preemption, rejecting it *not* by declaring it unavailable with a citation to *Cipollone,* but on the merits. *Id.* at 1742 n.12 ("We reject petitioner's claim of implied 'conflict' preemption . . . on the basis of the preceding analysis.").

Similarly, last Term, in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 114 S. Ct. 517 (1993), the Court reaffirmed the applicability of traditional "con-

[7] The *Cipollone* Court cited to *California Federal Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 282 (1987), and *Malone v. White Motor Corp.,* 435 U.S. 497, 505 (1978). 112 S. Ct. at 2618.

flict" preemption analysis under a statute containing an explicit preemption provision—even in the presence of a broad savings clause. The Court specifically held that ERISA's savings clause for state insurance law does *not* save state laws that would violate the Supremacy Clause under ordinary conflict preemption principles. "[W]e discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but 'where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs." *Id.* at 526. With respect to general preemption principles as well as the interpretation of savings clauses, that ruling cannot comfortably be squared with the Eleventh Circuit's decision in this case.

Not only does *Cipollone* fail to support the Eleventh Circuit's rigid separation of express and implied preemption, repudiation of implied preemption, and cramped, mechanical view of express preemption analysis; it points in the very opposite direction. A majority of the Court, in applying the express language of the statute at issue, made clear that analysis of a preemption provision, though starting with a presumption against preemption, must account for language, origins, statutory context, and purpose—as ordinary statutory interpretation does. 112 S. Ct. at 2618-21, 2624 n.27 (plurality opinion); *id.* at 2634-36 (opinion of Scalia and Thomas, JJ.). This more robust view of the scope of "express preemption," with its consideration of normal statutory implications, was foreshadowed by the Court's previous recognition that express and implied preemption were hardly "rigidly distinct" forms of analysis (*English v. General Elec. Co.,* 110 S. Ct. 2270, 2275 n.5 (1990)) and has been confirmed by the Court's subsequent preemption decisions, with their reliance on statutory "purpose" and "structure" (*CSX,* 113 S. Ct. at 1737) and the " 'purposes and objectives of Congress' " (*John Hancock,* 114 S. Ct. at 526). *See*

also Livadas v. Bradshaw, 114 S. Ct. 2068, 2075 n.11, 2083-84 (1994) (describing as "entirely semantic" the difference between a preemption claim "rooted in the text" and one "implicit in the structure of the Act").

Accordingly, to the extent that *Cipollone* is relevant to the Safety Act, it hardly excludes consideration of whether state law defeats the functioning of the federal statutory scheme at issue here.[8] Rather, in addition to making indisputable that the Safety Act's preemption provision applies to common-law standards (*see* note 3, *supra*), *Cipollone* clarifies that the core inquiry into the consistency of federal and state law is a proper part of express preemption analysis, quite apart from any separate "implied preemption" analysis. Indeed, several courts of appeals, including another panel of the Eleventh Circuit, have relied on *Cipollone* to hold that the very analysis they had formerly conducted under "implied preemption" actually supports a finding of "express preemption."[9]

Finally, *Cipollone* itself stands squarely against the Eleventh Circuit's reading of Section 1397(k). The court carried out nothing like the sort of careful statutory analysis that *Cipollone* mandates.[10] And it arrived at the very

[8] *See* pages 7-10, *supra*; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) (Act is "intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards."); S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966) ("The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.")

[9] *See Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied*, 114 S. Ct. 300 (1993). *See also Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993).

[10] The court ignored the placement of the provision by the 1966 Congress five sections after the preemption provision, which itself

same formalistic and implausible conclusion that this Court rejected in *Cipollone*—that a State may frustrate federal law by using its common law to achieve the same regulation that it is forbidden to achieve by explicit statute or rule. This Court should correct this erroneous reading of the Safety Act and the reading of *Cipollone* on which it is based.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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contained two genuine savings clauses of its own. *Compare CSX*, 113 S. Ct. at 1738 (the preemption provision itself "displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses"). The court also ignored the difference between section 1397(k)'s language and the typical language used to save state causes of action from preemption. *See, e.g., John Hancock, supra; Morales, supra; Guerra, supra.* Similarly, the court did not pause to consider the First Circuit's explanation that Section 1397(k) may readily be construed to reach common law suits other than those inconsistent with federal law. *Wood*, 865 F.2d at 404-06, 414-16. And the Court made no mention of the 1991 legislation (directed at airbags) in which Congress, having been apprised of the then-unbroken *Wood* line of cases, specifically indicated that it did "not want by this section to change the law on liability as it existed prior to enactment." H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991); *see* 15 U.S.C. § 1392 note (Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 92-8386, 92-8387 and 92-8536

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

v.

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

JACK LINDSEY, Executor of the Estate of GRACE C. LINDSEY, Deceased, JACK LINDSEY, as Surviving Spouse of GRACE C. LINDSEY Deceased,
Plaintiff-Appellant,

v.

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,
Defendant-Appellee,

INTERNATIONAL HARVESTER COMPANY,
Defendant.

Appeals from the United States District Court
for the Northern District of Georgia

Feb. 11, 1994

Before EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

CARNES, Circuit Judge:

This consolidated appeal presents the question of whether a common law tort action for failure to install anti-locking brakes in a tractor-trailer truck is pre-empted by provisions of the National Traffic and Motor Vehicle Safety Act ("the Safety Act"), Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified at 15 U.S.C. §§ 1381-1431). This Court answered a similar question arising under the same statute in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir.1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990), which held that a common law tort action for failure to install air bags was pre-empted by the Safety Act. The Supreme Court's exposition of pre-emption law in an intervening decision, *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), requires that we revisit our *Taylor* decision in order to determine how much of it survives *Cipollone* and whether the surviving portion of *Taylor* controls these cases.

FACTS AND PROCEDURAL HISTORY

The complaint in the Myrick case alleges that an eighteen wheel tractor-trailer was proceeding south on a highway in Morgan County, Georgia. Because of slowing traffic ahead, the driver applied the brakes which caused the rear wheels to lock and the trailer to jackknife and

swing across the center divider into the path of oncoming traffic. Plaintiff Ben Myrick had the misfortune to be in a northbound vehicle on the same highway at the critical time. The jackknifing trailer collided with his vehicle. As a result, Mr. Myrick suffered serious injury; he is permanently paraplegic and brain damaged. Neither the tractor nor the trailer that collided with Mr. Myrick's vehicle had an anti-locking brake system.

Mr. Myrick filed a lawsuit in state court against the manufacturer of the tractor, the Freightliner Corporation, and the manufacturer of the trailer, the Freuhauf Corporation, alleging that the absence of anti-lock brakes was a negligent design and rendered the tractor defective.[1] His wife, Emily Myrick, asserted a separate claim for loss of consortium. The defendants removed the case to federal court based on diversity of citizenship.

The facts alleged in the Lindsey case are similar. A tractor-trailer rig was proceeding south on a highway in Oconee County, Georgia when the driver applied the brakes because an automobile stopped in front of it. The wheels locked, the trailer began to jackknife and slid across the center lane into the northbound lane of traffic. This time the victim was Grace Lindsey, whose automobile was proceeding north when it collided with the jackknifed trailer. Mrs. Lindsey was killed. Neither the tractor nor the trailer was equipped with an anti-locking brake system.

Mrs. Lindsey's husband, Jack Lindsey, filed a lawsuit in state court against Navistar International Transportation, the manufacturer of the tractor.[2] He alleged that Navistar's failure to supply anti-lock brakes was a negli-

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[1] The case against Freuhauf was dismissed with prejudice by agreement of the parties.

[2] The International Harvester Company, Navistar's corporate predecessor, was dismissed pursuant to a stipulation that Navistar had assumed the liability, if any, of International Harvester.

gent design which rendered the tractor defective and unsafe. Navistar removed the case to federal court based on diversity of citizenship.

Both lawsuits were decided in United States District Court for the Northern District of Georgia, 795 F.Supp. 1139. In the Myrick case, the district court granted summary judgment on behalf of the defendants on grounds that the action was impliedly preempted by the Safety Act and regulatory standards adopted under it. The court found the matter to be controlled by this Court's holding in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir.1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990). Four days after the order in the nature of an opinion was entered in the Myrick case, a different judge of the same district court reached the same result in the Lindsey case. In doing so, he adopted the reasoning of the order in the Myrick case and found the cause of action to be preempted by the federal act and regulatory standards.

This Court consolidated the two cases for purposes of appeal. Because the issues are identical and joint briefs have been filed on both sides, we will refer to the plaintiffs in the two cases collectively as "Plaintiffs," and we will refer to the remaining defendants in both cases collectively as "Manufacturers." [3]

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[3] In their complaint, the Myricks averred not only common law causes of action but also a statutory cause of action based upon allegations that the Manufacturers' efforts to secure favorable regulation had violated the Georgia RICO statute. The district court found that the Myricks' statutory cause of action as well as the common law causes of action were pre-empted. On appeal, the Myricks, joining with Lindsey who alleged only common law claims, have argued only against pre-emption of the common law claims. They apparently have abandoned any contention that the state statutory claim is not pre-empted. Therefore, we will confine our discussion and holdings to the common law causes of action.

ANALYSIS

I. PRE-*CIPOLLONE* PRE-EMPTION LAW

The laws of the United States are the supreme law of the land, any state constitution or law notwithstanding. U.S. Const. art. VI, cl. 2. Thus, state law may not override or interfere with federal laws. That is the core premise of pre-emption doctrine. On the other hand, "[i]n the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.' " *CSX Transportation, Inc. v. Easterwood*, —— U.S. ——, ——, 113 S. Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) (citation omitted). *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26, 97 S.Ct. 1305, 1309-10, 51 L.Ed.2d 604 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). The Supreme Court has instructed us that state law is pre-empted by federal law in three circumstances:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law . . . .
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it". . . .
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements. . . .

English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990); *See also Michigan Canners and Freezers Assoc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984); *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548, 1552 (11th Cir.1991), *aff'd*, —— U.S. ——, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). We must apply these principles and relevant case law to determine if the Plaintiffs' claims, premised on the Manufacturers' failure to install anti-locking brakes, are pre-empted by the Safety Act.

II. THE SAFETY ACT AND THE *TAYLOR* DECISION

The Safety Act authorizes the extensive regulation of commercial trucks including the vehicles involved in these cases. Numerous safety standards have been established by the National Highway Traffic Safety Administration pursuant to the Act, including a standard, applicable at the relevant times in these cases, that effectively gave manufacturers the choice of whether to install anti-lock brakes. The Safety Act includes a pre-emption clause which provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). Additionally, the Safety Act contains a savings clause:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Id. § 1397(k).

In *Taylor*, a panel of this Court decided the question of whether the Safety Act pre-empts state common law causes of action arising out of the failure of automobile manufacturers to install air bags in their vehicles. We addressed the pre-emption question in two parts: first express pre-emption, and then implied pre-emption. We recognized that a successful state tort action based on the failure of a manufacturer to install air bags would have an effect similar to a state regulation requiring installation of air bags. 875 F.2d at 824 n. 16. Nonetheless, this Court held that such tort actions were not expressly pre-empted by the Safety Act. *Id.* at 825. We began by recognizing that "a strong presumption exists against finding express pre-emption when the subject matter, such as the provision of tort remedies to compensate for personal injuries, is one that has traditionally been regarded as properly within the scope of the states' rights." *Id.* at 823. In view of that presumption, we recognized our task as being "to determine whether the language of the Safety Act 'unmistakably' manifests an intent to pre-empt appellants' common law claims." *Id.* We held that it did not.

In the *Taylor* case, safety standards that had been established under the Act provided for the installation of either seat belts or air bags, giving manufacturers a choice between restraint systems. *Id.* at 822-23. The manufacturers argued that common law tort liability for failure to install air bags was expressly pre-empted by the Safety Act's pre-emption clause. This Court rejected that argument, because the Act's savings clause plainly stated that compliance with any safety standard did not exempt anyone from common law liability. *Id.* at 823-25. The manufacturers urged that the savings clause should be narrowly interpreted to preserve common law liability only

for defects that were not specifically addressed by a safety standard promulgated under the Act. We rejected that argument, because such a construction "would render the savings clause a mere redundancy since the pre-emption clause itself provides that where a federal standard does not govern 'the same aspect of performance' as the state standard, the state standard is not pre-empted." *Id.* at 824. Recognizing our duty to give effect to every clause of a statute, we rejected the manufacturers' proposed construction of the savings clause because "it would render an entire section of the Safety Act superfluous." *Id.*

We also gave another reason for rejecting the manufacturers' argument that the Safety Act expressly pre-empted common law tort actions on defects that were addressed by a safety standard. We said:

> An additional factor militating against a finding that the language of the Safety Act expressly pre-empts appellants' claims is that Congress did not make explicit reference to state common law in the Act's pre-emption clause as it has in the pre-emption clauses of many other statutes. Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires. The absence of such an explicit reference to state common law in the Safety Act's pre-emption clause therefore counsels against a finding of express pre-emption.

Id. at 824-25 (citations omitted). We ended our discussion of the express pre-emption issue by stating our holding as follows:

> Given the conflict between the language of the Safety Act's pre-emption and savings clauses, and the failure of Congress explicitly to include reference to state common law in the Act's pre-emption clause, we conclude that the Safety Act cannot be construed as unambiguously manifesting an intention to pre-empt appellants' common law claims. We therefore

> hold that appellants' claims are not expressly pre-empted by the Safety Act.

Id. at 825. In a footnote to that holding we said:

> We conclude only that the language of the Safety Act is too ambiguous to manifest a Congressional intent to pre-empt appellants' common law claims under an express pre-emption analysis; we do not find to the contrary—that the Safety Act's savings clause unmistakably manifests an express intention on the part of Congress to preserve appellants' common law claims.

Id. at 825 n. 18.

After holding in *Taylor* that state tort actions premised on a defect specifically addressed by a safety standard promulgated under the Safety Act were not expressly pre-empted, this Court turned to the question of implied pre-emption. The pertinent safety standard that had been established under the Act granted to manufacturers an option to install air bags or manual seat belts, and we held that "a state common law rule that would, in effect, remove the element of choice authorized [by the Safety Act] would frustrate the federal regulatory scheme." *Id.* at 827. For that reason, we concluded that common law tort claims based on a failure to install air bags were impliedly pre-empted by the Safety Act because they would interfere with and frustrate the methods by which the federal regulations sought to accomplish their goals. *Id.* That is the way the law of this Circuit stood on pre-emption in general and pre-emption under the Safety Act in particular, until *Cipollone* was decided three years later.

III. THE *CIPOLLONE* DECISION AND ITS EFFECT ON *TAYLOR*

The Supreme Court in *Cipollone* added a new wrinkle to the fabric of pre-emption law by holding that where a federal statute contains an express pre-emption clause,

and that clause "provides a 'reliable indicium of congressional intent with respect to state authority,' " a court should not consider implied theories of pre-emption. *Cipollone v. Liggett Group, Inc.*, —— U.S. at ——, 112 S.Ct. at 2618 (citation omitted). The *Cipollone* Court held that the enactment by Congress of such a provision addressing the pre-emptive scope of the statute in which it is contained indicates an intent that all matters beyond the reach of the provision are not pre-empted. Therefore, where there is an express pre-emption provision a court "need only identify the domain expressly pre-empted" by the statutory provisions. *Id.* The *Cipollone* Court reasoned that if Congress had intended further pre-emption it would have said so in the pre-emption provision it included in the act.

It is the law of this Circuit that we are bound by a prior panel's decision except to the extent it is altered by a supervening Supreme Court decision, which we will, of course, follow instead. *E.g., Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir.1992); *Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 326, 121 L.Ed.2d 246 (1992). We are bound by the *Taylor* panel's holding, unchanged by *Cipollone*, that the Safety Act does not expressly pre-empt common law liability for a safety defect that is addressed by a safety standard established under the Safety Act. *Taylor* is indistinguishable from this appeal with regard to that holding. The plaintiffs in *Taylor* asserted tort claims sounding in negligence and strict liability, as do the Plaintiffs here. In both cases, the claims were premised on a failure of the manufacturers to install specific safety devices in their vehicles, and in both cases a safety standard established under the Act effectively gave the manufacturers the option of not installing the device. Exactly the same pre-emption clause and savings clause are involved in both cases. Thus, we are bound to conclude that the claims presented by the Myricks and Jack Lindsey in this appeal are not expressly

pre-empted by the Safety Act just as similar claims were held not to be expressly pre-empted by the same act in the *Taylor* case.

Because of the Supreme Court's *Cipollone* decision, however, we are bound not to follow the second part of *Taylor* which held that claims similar to the ones here were barred under the implied pre-emption doctrine. *Cipollone*'s clear instruction that when there is an express pre-emption provision we should not consider implied pre-emption supersedes the second part of *Taylor*. Factoring *Cipollone* into *Taylor* produces a net result of no pre-emption in this case.

IV. THE CONTRARY ARGUMENTS OF THE MANUFACTURERS AND THEIR AMICI

The Manufacturers and their amici suggest that we err by reading *Cipollone* to mean what it says about not considering implied pre-emption when there is an express pre-emption provision in the statute. If we do err we are in good company, because at least eight of our sister circuits have reached the same conclusion about the meaning of the *Cipollone* decision. *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818, 823 (1st Cir.1992) ("[T]he High Court has made it pellucidly clear that, whenever Congress includes an express pre-emption clause in a statute, judges ought to limit themselves to the pre-emptive reach of that provision without essaying any further analysis under the various theories of implied pre-emption."), *cert. denied*, —— U.S. ——, 113 S.Ct. 974, 122 L.E.2d 129 (1993); *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615, 623 (2d Cir.1992) ("where a pre-emption provision provides a 'reliable indicium of congressional intent' a court is required to restrict its pre-emption analysis to that clause"); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir.1993) ("Articulating a specific approach to interpreting a statute that expressly addresses preemption, the [*Cipollone*] Court limited the task to first determining

whether the relevant provisions reliably indicate congressional intent with regard to preemption of state authority, and second, if so, to interpreting the express language."); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir.1993) ("Applying *Cipollone*, we reject, at the outset, Collagen's contention that we may resort to the doctrine of implied pre-emption . . . ."), *cert. denied*, —— U.S. ——, 114 S.Ct. 86, 126 L.Ed.2d 54 (1993); *American Agriculture Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir.1992) ("Only if a statute is devoid of explicit pre-emptive language may we resort to either variant of implied pre-emption."); *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354, 358 (8th Cir.1993) ("When Congress has [included] . . . a provision explicitly addressing [pre-emption], and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.' "); *Draper v. Chiapuzio*, 9 F.3d 1391 (9th Cir.1993) (stating that because the federal act under consideration contains an express pre-emption provision which provides a reliable indicium of congressional intent, "[w]e therefore look only to this language and construe its preemptive effect as narrowly as possible"); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447 (10th Cir.) ("when the Court recently applied the doctrine of *expressio unius est exclusio alterius* to pre-emption cases, it excluded consideration of all forms of implied pre-emption, including conflict pre-emption"), *cert. denied*, —— U.S. ——, 114 S.Ct. 291, 126 L.Ed.2d 240 (1993). So far as we can ascertain, no circuit has yet had the temerity to tell the Supreme Court that it did not mean what it said in *Cipollone*, and we decline the Manufacturers' invitation to be the first one to do so.

Moreover, two other panels of this Court apparently have reached the same conclusion we reach about the meaning of *Cipollone*. In *Papas v. Upjohn Co.*, 926 F.2d

1019 (11th Cir.1991) (*Papas I*), this Court held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") impliedly pre-empted certain claims. *Id.* at 1024-26. We declined to reach the express pre-emption issue about which we admitted "a little uncertainty." *Id.* at 1024. The Supreme Court vacated and remanded that decision for further consideration in light of its *Cipollone* decision. *Papas v. Zoecon Corp.*, —— U.S. ——, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). On remand, this Court took the hint and re-decided the case solely on express pre-emption grounds. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.1993) (*Papas II*). In doing so, we explained that, "[t]o determine FIFRA's pre-emption of the Papases' claims we will 'only identify the domain expressly pre-empted' by FIFRA['s express pre-emption clause]." *Papas II*, 985 F.2d at 518 (quoting *Cipollone*, —— U.S. ——, 112 S.Ct. at 2618).

In *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir.1993), another panel of this Court held that the Federal Aviation Act and aircraft design standard regulations promulgated thereunder did not pre-empt a state common law action for the negligent or defective design of an aircraft, even though the aircraft complied with federal design standards. The federal act in that case contained an express pre-emption clause, but the district court had found implied pre-emption. In reversing, this Court cited *Cipollone* for the proposition that "where Congress has with words pre-empted some kinds of state lawmaking, courts are cautious about relying on implied pre-emption theories to limit state authority further." *Id.* at 294. Finding that the pre-emption clause in the act was a reliable indicium of Congress' intent on state authority to regulate civil aviation, and that that pre-emption clause did not bar such lawsuits, this Court concluded that they were not pre-empted. Id. at 295. Consistently with the *Cipollone* rule, no implied pre-emption analysis was conducted.

The actions of the *Lake Aircraft* panel and of the *Papas II* panel constitute acknowledgment of that which we hold today: where, as here, there is an express pre-emption provision, which constitutes a reliable indicium of congressional intent, implied pre-emption analysis has no place.

This cannot be so, the Manufacturers argue, because a decision the Supreme Court issued just six days before *Cipollone* is inconsistent with the interpretation of *Cipollone* that we and five other circuits have reached. In *Gade v. National Solid Wastes Management Assoc.*, —— U.S. ——, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992), the Court held that state laws that address public safety as well as occupational safety were pre-empted by the Occupational Safety and Health Act ("OSHA"), which has the single purpose of furthering occupational safety. While the main thrust of the *Gade* decision was that state laws with purposes different from a federal law may still be pre-empted, a plurality of the Court reached this decision under an implied pre-emption theory despite OSHA's express pre-emption clause. *Id.* at ——, 112 S.Ct. at 2383. A fifth member of the Court, Justice Kennedy, joined in the result, but would have found the state laws expressly pre-empted by OSHA. *Id.* at ——, 112 S.Ct. at 2388-39. The Manufacturers argue that the Supreme Court could not have intended the rule announced in *Cipollone* because the analysis in *Gade* is inconsistent.

We are bound to follow an applicable holding of a majority of the Supreme Court, and the rule in *Cipollone* was announced by a majority of the Supreme Court. The inconsistency the Manufacturers would ascribe to *Gade*, by contrast, can be drawn only from a plurality opinion. As we have held before, "[a] plurality opinion is not binding on this Court and we are compelled to follow both our precedent as well as prior Supreme Court precedent. . . ." *Foster v. Board of School Comm'rs*, 872

F.2d 1563, 1569-70 (11th Cir.1989) (citations omitted); *accord, Johnson v. Dugger*, 911 F.2d 440, 471 n. 76 (11th Cir.1990), *cert. denied*, —— U.S. ——, 113 S.Ct. 361, 121 L.Ed.2d 274 (1992).

Because the rationales adopted by the plurality and Justice Kennedy are at odds with each other, the only holding in *Gade* is the result that OSHA pre-empts state laws which regulate in an area regulated by OSHA, regardless of whether the state law has an ancillary purpose. This narrow holding does not compel us to conclude that the Court did not mean what it said six days later in *Cipollone*. Moreover, *Cipollone* came after *Gade*, not the converse. If there is any conflict or inconsistency of holdings we would be bound to follow the more recent of the two decisions. The pronouncement in *Cipollone* was from a majority of the Court, not a mere plurality; it is the more recent exposition; and it is binding on this Court, notwithstanding the implications that the Manufacturers would have us draw from other cases.

The Manufacturers further contend that the Supreme Court could not have intended to exclude forays into implied pre-emption analysis based upon the existence of an express pre-emption provision because in earlier cases a majority of the Court did consider implied pre-emption in the face of an express pre-emption clause. To support their proposition they cite *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), where the Court held that ERISA expressly and impliedly pre-empted a state common law claim that an employee was discharged to prevent him from obtaining benefits under an ERISA-covered plan. In reaching its holding, the Court construed ERISA's express pre-emption provision to bar the common law action. *Id.* at 140, 111 S.Ct. at 484. As an alternative holding, the Court decided that "[e]ven if there were no express pre-emption," the state cause of action would be impliedly pre-empted because it directly conflicted with a cause of action under ERISA. *Id.* at 142, 111 S.Ct. at 484-85.

The *McClendon* decision did not hold, as the Manufacturers would have us conclude, that where an express pre-emption clause does not pre-empt claims, those claims can nonetheless be barred under implied pre-emption doctrine. Therefore, *McClendon* does not squarely conflict with the rule of *Cipollone*. Even if it did, we would follow the more recent *Cipollone* decision. We decline to allow a contrary inference drawn from an earlier case to overcome the direct teaching of a more recent Supreme Court instruction on how we are to consider claims of pre-emption. Therefore, the rule announced and applied in *Cipollone*, that implied pre-emption should not be used to foreclose a claim where a statute contains an express pre-emption provision which is a "reliable indicium of congressional intent," will be followed by this Court.

A recent, post *Cipollone* pre-emption decision of the Supreme Court buttresses our conclusion. *CSX Transportation, Inc. v. Easterwood,* —— U.S. ——, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), involved the issue of whether state court negligence claims of excessive speed and absence of warning devices were pre-empted by the Federal Railroad Safety Act (FRSA) and regulations promulgated under it. *Id. at* ——, 113 S.Ct. at 1736. The Supreme Court laid down these rules of decision:

> Where a state statute conflicts with or frustrates federal law, the former must give way. U.S. Const., Art. VI, cl. 2; *Maryland v. Louisiana,* 451 U.S. 725, 746 [101 S.Ct. 2114, 2128, 68 L.Ed.2d 576] (1981). In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947). Evidence of pre-emptive purpose is sought in the text and

> structure of the statute at issue. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95 [103 S.Ct. 2890, 2899, 77 L.Ed.2d 490] (1983). If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

Id. at ——, 113 S.Ct. at 1737. The FRSA, like the Safety Act in this case, has both a pre-emption clause and a savings clause. *Id.* at ——, 113 S.Ct. at 1736. Together, those FRSA provisions expressly pre-empted any state requirement, including one imposed by common law negligence actions, where there was any federal "rule, regulation, order, or standard covering the subject matter of such State requirement." *Id. at* ——, 113 S.Ct. at 1736-37 (quoting 45 U.S.C. § 434).

The *Easterwood* Court applied the pre-emption measure expressly stated in the statute to conclude that a common law claim for the absence of warning devices at grade crossings was not pre-empted. *Id.* at ——, 113 S.Ct. at 1738-42. After a lengthy discussion applying only the measure of pre-emption expressly set out in the FRSA, the Court relegated to one sentence of a footnote its response to an implied pre-emption argument: "We reject petitioner's claim of implied 'conflict' pre-emption . . . on the basis of the preceding analysis." *Id.* at ——, 113 S.Ct. at 1742 n. 12. The "preceding analysis" was the express pre-emption discussion, so, the Supreme Court in that post-*Cipollone* decision did not conduct a separate implied pre-emption analysis where the negligence claim was not barred under the explicit pre-emption provision of the statute.[4] Seven members of the Court joined that part of

[4] We are aware that the one-sentence footnote reference to implied pre-emption in *Easterwood* is not without ambiguity. It might be argued that the Court intended to reject implied pre-emption on the merits for the same reasons it had found no express pre-emption. We resolve that ambiguity in light of the more ex-

the opinion and the two others concurred in it. *Easterwood*, therefore, appears to reinforce the commands of *Cipollone* that where there is an express pre-emption provision, it is to be the alpha and omega of pre-emption analysis.

The Manufacturers also argue that the pre-emption clause in the Safety Act is not a "reliable indicium of congressional intent," and that the *Cipollone* rule is therefore inapplicable. The Supreme Court did condition its *Cipollone* rule on the pre-emption clause being a "reliable indicium of congressional intent," but the Court provided no explanation of that term. We can only infer from the way in which the Supreme Court failed to pause for long over the matter that the reliable indicium requirement is not much of a hurdle. That inference is reinforced by the *Easterwood* decision in which the Court said the task of statutory construction must begin with the plain wording of an express pre-emption clause, and then ended it there as well. There was no mention in *Easterwood* of the "reliable indicium" requirement.

None of our sister circuits that have considered application of the *Cipollone* rule to various statutes have yet found a pre-emption clause that was not a reliable indicium of congressional intent. *See, e.g., Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818, 823 (1st Cir.1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 974, 122 L.Ed.2d 129 (1993); *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615 (2d Cir.1992); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 86, 126 L.Ed.2d 54

plicit statement earlier in the opinion that where there is a pre-emption clause, it is "the best evidence of Congress' pre-emptive intent." —— U.S. at ——, 113 S.Ct. at 1737. A contrary interpretation would mean that just ten months after issuing its clear holding in *Cipollone*, the Supreme Court did an about-face by means of one ambiguous sentence in a footnote, something we find difficult to believe.

(1993); *American Agriculture Movement v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir.1992); *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir.1993); *Draper v. Chiapuzio*, 9 F.3d 1391 (9th Cir.1993); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444 n. 17 & 1447 (10th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 291, 126 L.Ed.2d 240 (1993). In our own *Papas II* decision, another panel of this Court acknowledged the reliable indicium requirement, but concluded, without much explanation, that that requirement was met. *Papas II*, 985 F.2d at 517.

At the very least, the treatment of the requirement in *Cipollone* and in decisions that have applied the rule of *Cipollone* establish that there is a presumption that a pre-emption clause is a reliable indicium of congressional intent. Such a presumption is in keeping with the general rule of assuming that Congress intended what it said. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164, 105 S.Ct. 638, 645, 83 L.Ed.2d 556 (1985) ("In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'"); *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir.1989) ("the court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language"); *United States v. Jones*, 811 F.2d 444, 447 (8th Cir.1987) ("it is appropriate to assume that the ordinary meaning of those words [of the statute] accurately expresses the legislative purpose").

Even without such a presumption, we would be convinced that the express pre-emption provisions of the Safety Act are a reliable indicia of congressional intent. The legislative history so indicates. The House Committee Report describes the congressional intent about pre-emption and the purpose of the savings clause which was written into the Act:

> [T]he reported bill provides that compliance with any Federal motor vehicle safety standard does not exempt a person from any liability under common law.
>
> It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contracts, and tort liability.

H.R.Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966). The legislative history demonstrates that the pre-emption provisions of the Safety Act, which include the savings clause, are a reliable indicium of congressional intent. *See Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir.1993), in which we held a pre-emption clause to be a reliable indicium of congressional intent based upon a Tenth Circuit analysis which relied heavily upon a legislative committee report.

Moreover, we are unable to perceive any material difference as it relates to the reliable indicium issue between the pre-emption provisions in this case and the pre-emption provisions that the *Cipollone* Court had no difficulty finding to be reliable indicia in that case. *See Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.1993) (where a pre-emption provision in another statute is similar to the one in *Cipollone*, it, too, provides a reliable indicium of congressional intent).

The Manufacturers argue that the Safety Act delegates rule-making power to a federal agency, and that this difference from the statute in *Cipollone* suggests that Congress' inclusion of the pre-emption clause in the Safety Act could not have been intended as a sole expression of pre-emption. They argue that it is unreasonable for a pre-emption clause to provide the full extent of pre-emption when agency rule-making is expected to occur; therefore, the pre-emption clause cannot be considered a reliable indicium of what Congress intended to pre-empt. This argument fails, however, because it is Congress which has the authority and responsibility for determining the scope of pre-emption. Congress defined the pre-emptive scope of the Act to include safety standards promulgated by an administrative agency, but there is no indication that Congress intended to let the administrative agency decide whether such safety standards would pre-empt state law. That is a decision which Congress itself made in the Safety Act's pre-emption provisions just as it made that decision in the pre-emption provisions involved in *Cipollone*. This argument of the Manufacturers is also rebutted by the *Easterwood* decision, which relied solely upon the pre-emption clause in a statute which delegated rulemaking authority to an executive agency.

Amici for the Manufacturers argue that the pre-emption clause cannot be the sole expression of the Safety Act's pre-emptive scope, because the savings clause also addresses the Act's pre-emption. Since it alone does not cover the field of pre-emption, amici argue, the pre-emption clause cannot be a reliable indicium of congressional intent. This contention echoes the Plaintiffs' argument that a conflict between the savings clause and the pre-emption clause renders the pre-emption clause unreliable as an indicator of intended pre-emption. These arguments rest on a reading of pre-emption "provisions" that is far too narrow. We are concerned with what Congress expressly stated about pre-emption, and in the Safety Act Congress put its statements about pre-emption in two statutory provisions, one of which we refer to as a pre-emption clause and the other one we call a savings clause. Our terminology notwithstanding, both of the clauses are pre-emption provisions in the material sense of the word, because both clauses explicitly deal with the subject of what is and is not pre-empted. Our rejection of this argument finds support in the *Easterwood* decision, because that case also

involved not only a pre-emption clause but also a savings clause.

We did say in a footnote in *Taylor* that "the language of the Safety Act is to ambiguous to manifest a congressional intent to pre-empt appellants' common law claims under an express pre-emption analysis." 875 F.2d at 825 n. 18. That statement does not indicate that the pre-emption provisions of the Safety Act, which are the pre-emption clause and savings clause considered together, are not reliable indicia of congressional intent. Those provisions clearly pre-empt certain state action. For example, a state legislative enactment requiring action forbidden by a safety standard clearly would be pre-empted. That the provisions are not sufficiently clear to pre-empt other state action does not mean that those provisions do not reliably indicate Congress' intent. A recent district court decision takes a contrary approach. In *Gills v. Ford Motor Co.*, 829 F.Supp. 894 (W.D.Ky.1993), the district court concluded that the Safety Act, by virtue of the ambiguity inherent in its pre-emption clause, lacks the "reliable indicium" of congressional intent required by *Cipollone*. *Id.* at 898. The *Gills* decision, like the manufacturers and their amici in this case, fails to give due consideration to the long-standing rule, in the nature of a presumption, that the only state action that is pre-empted is that which Congress has clearly indicated is to be pre-empted. *CSX Transportation, Inc. v. Easterwood*, —— U.S. ——, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993); *Cipollone*, —— U.S. at ——, 112 S.Ct. at 2617; *Jones v. Rath Packing Co.*, 430 U.S. at 525, 105 S.Ct. at 1309; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230, 67 S.Ct. at 1152. Moreover, in Cipollone, seven justices agreed that an express pre-emption provision that provides a reliable indicium of congressional intent moots any implied pre-emption analysis. The same seven justices also agreed that the Public Health Cigarette Smoking Act of 1969 (PHCSA), codified at 15 U.S.C. §§ 1331-1340, contains

such a provision. However, the justices split four to three on the scope of that express pre-emption clause, which was debatable among jurists of reason. In other words, the statutory language was ambiguous. Nonetheless, a majority of the Supreme Court treated the PHCSA as providing a reliable indicium of congressional intent. Thus, Cipollone itself is inconsistent with the notion that ambiguous statutory language cannot provide a reliable indicium of congressional intent. If all that were required to defeat the *Cipollone* rule is for some ambiguity or uncertainty to exist, then few, if any, pre-emption provisions would ever be held to be reliable indicia of congressional intent.[5]

The argument that ambiguity equates with unreliability is also foreclosed by this Court's *Papas* decisions and by *Cipollone* itself. The reason that this Court did not address express pre-emption in its first *Papas* opinion is that the pre-emption provision in that case left us with uncertainty about whether the claim was pre-empted. 926 F.2d at 1023-24. Notwithstanding the ambiguity of that pre-emption provision and our admitted uncertainty about its application, after remand from the Supreme Court for further consideration in light of *Cipollone*, we held that same ambiguous pre-emption provision to be a reliable indicium of congressional intent. 985 F.2d at 517. Moreover, the pre-emption provision involved in one of the statutes in *Cipollone* itself was ambiguous, as is evidenced by the fact that the Justices were divided over whether various claims were expressly pre-empted under it. Notwithstanding the ambiguity of that pre-emption provision in *Cipollone*, and the dispute over which claims it cov-

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[5] The *Gills* court also reasoned that it was "quite plausible that Congress intended [the pre-emption clause] . . . to apply not only to statutes and regulations but to conflicting common law standards as well." *Gills*, 829 F.Supp. at 898. We have previously rejected such a reading of the pre-emption clause, because it would render the savings clause a redundancy. *Taylor*, 875 F.2d at 824.

ered, a majority of the Supreme Court still held that the provision provided a reliable indicium of congressional intent.

Finally, the Manufacturers and their amici shift the focus of their attack and target *Taylor*'s holding that common law tort claims are not expressly pre-empted by the Safety Act. They argue that that holding was vitiated by *Cipollone* even though different statutes were involved and there was no savings clause in the *Cipollone* statutes. It is true that one of the factors this Court considered in *Taylor* was that the pre-emption clause did not expressly mention state common law. 875 F.2d at 824-25. It is also true that *Cipollone* found express pre-emption of some claims even though the pre-emption clauses in that case also did not mention state common law. Those facts do not mean that *Cipollone* overruled *Taylor*'s conclusion, which is equally applicable to these cases, that the claims were not expressly pre-empted.

Cipollone does not say that whether a pre-emption clause mentions state common law is a question that is irrelevant or of little importance. *Cipollone*, unlike *Taylor*, did not involve a situation where Congress' failure to mention common law actions in a pre-emption clause was made doubly conspicuous by its explicit reference to common law liability in a savings clause. In the Safety Act involved in *Taylor*, Congress did not explicitly say that common law liability was pre-empted, but it did explicitly say that common law liability was saved. That was not the situation in *Cipollone*. Even without considering the failure of the pre-emption clause to mention state common law, because of the savings clause we still "conclude that the Safety Act cannot be construed as unambiguously manifesting an intention to pre-empt appellants' common law claims." *Taylor*, 875 F.2d at 825.

CONCLUSION

The task of deciding this appeal primarily involves laying the *Cipollone* decision over the *Taylor* decision. Having done that, we see that those two decisions mandate a holding that the Plaintiffs' common law claims are not pre-empted by the Safety Act. We are required to reverse the decisions of the district courts, which did not have the benefit of *Cipollone* when they ruled. The district courts' orders granting summary judgment on behalf of the Manufacturers are REVERSED.[6]

HILL, Senior Circuit Judge, dissenting:

The majority opinion in this case advances the growing view that because several recent Supreme Court opinions have found that federal regulations did not pre-empt state common law claims, the Supremacy Clause is no longer fashionable. I do not agree.

According to Article VI of the Constitution, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, it is well settled that state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, ——, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (citation omitted). In this case, federal law provides that Appellee manufacturers may produce vehicles equipped with airbrake systems (which are not antilock brakes) and Appellants argue for a state law that would not allow the manufacture of such vehicles. Insomuch as one conflicts with the other, both cannot survive. I conclude that the "supreme Law of the Land" must survive and an action brought premised upon the validity of the state's law must be dismissed.

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[6] Our reversal does not affect the grant of summary judgment as to the statutory cause of action in the *Myrick* case. See n. 3, above.

The Supreme Court has developed principles to guide pre-emption analysis to avoid unintended displacement of State authority over matters within States' historic police powers. In conducting a pre-emption inquiry, "a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *CSX Transp., Inc. v. Easterwood,* —— U.S. ——, ——, 113 S.Ct. 1732, 1737, 123 L.Ed. 2d 387 (1993). Therefore, pre-emption should not be found unless it is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). "Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue." *Easterwood,* —— U.S. at ——, 113 S.Ct. at 1737.

Through the National Traffic and Motor Vehicle Safety Act (the "Safety Act") 15 U.S.C. § 1381, *et seq.,* Congress authorized the Secretary of Transportation to regulate motor vehicle safety. Under authority delegated by the Secretary, the National Highway Traffic Safety Administration("NHTSA") administers the Safety Act by promulgating appropriate minimum performance standards for various motor vehicle components. The NHTSA has devised far-reaching regulations governing the manufacture of vehicles. The regulation covering the performance of truck brake systems is 49 C.F.R. § 571.121 (1991) ("Standard 121").

Standard 121 has a long and tumultuous history. Its initial effective date was March 1, 1975. Standard 121 as originally promulgated effectively required the inclusion of antilock brake systems by requiring vehicles to be able to be stopped within certain distances at specified speeds without significant lockup. *See Paccar, Inc. v. National Highway Traffic Safety Admin.,* 573 F.2d 632, 637 (9th Cir.1978). In response to the Ninth Circuit Court of Appeals' opinion in *Paccar,* the NHTSA revised Standard 121 by adding a specific statement that the stopping

distance criteria and related performance requirements which necessitated antilock brakes were not applicable to trucks and trailers. Other sections of Standard 121 relating to performance standards for airbrake systems were left intact. The exemption of trucks and trailers from the antilock requirements was in effect at the time of manufacture of the two trucks involved in this case and remains in effect today. This scheme effectively gives manufacturers the choice of whether to install antilock brakes or airbrakes.

It is important to recognize what this case is *not* about. This is not a case where one may be held to have violated a state requirement to exercise due care because one has acted in a fashion permitted by law but dangerous under the particular circumstances surrounding the action. It is hornbook law that operation of a motor vehicle at the maximum speed permitted by law may violate the legally required duty to exercise due care when and if the circumstances surrounding the operation—rain, sleet, snow, poor visibility, crowded roadway, etc.—make such a speed careless. I submit, however, that one could not predicate a claim upon the operation of a vehicle at or under the allowed speed limit upon an assertion that the speed limit in the particular state ought to have been less than that determined by its legislature.

It is the latter type of claim attempted here. Appellees do not admit that state law "allows" federal law to establish permissible brake systems, but neither do they dispute that state law may make such systems unlawful under particular circumstances. Appellants say that the federal law, being wrong or poorly advised, must yield to a state law which may be found to have been violated by those who followed the federal law. There are no changing circumstances; the NHTSA has authorized airbrake systems on these vehicles and has, presumably, considered all circumstances extant in this land touching upon that authorization. The federal law governing

brakes on motor trucks is not subject to veto by a state judge instructing a state jury that it may disapprove of the federal standard and find that it violates state law.

The majority opinion reads the Supreme Court's recent pre-emption exposition in *Cipollone* as precluding any implied pre-emption analysis where Congress has included an express pre-emption clause in a statute. In this, I believe the majority has gone too far. Unquestionably, *Cipollone* limits the role of implied pre-emption where there is an express pre-emption clause. But nothing in the fact-specific holdings of *Cipollone* mandates that implied pre-emption is no longer viable in the face of an express pre-emption clause.

In *Cipollone,* the Supreme Court considered whether state law damage claims were pre-empted by provisions of the Federal Cigarette Labeling and Advertising Act, enacted in 1965, and its successor, the Public Health Cigarette Smoking Act of 1969. These acts mandate specific labels that must be included in the advertising and packaging of cigarettes. The Court held that the 1965 Act pre-empted state bodies only from mandating particular cautionary statements and did not pre-empt other state law damage actions. *Cipollone,* —— U.S. at ——, 112 S.Ct. at 2619. One of the reasons given by the Court is that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damage actions." *Id.,* —— U.S. at —— 112 S.Ct. at 2618. This language suggests that implied pre-emption by conflict remains a viable concept.

The Court analyzed pre-emption under the 1969 Act separately. Noting that the pre-emption clause in the 1969 Act was specifically given a broader reach by Congress, the Court analyzed each state law claim to determine if the "legal duty that is the predicate of the common law damages action" depended on subject matter governed by the federal regulation. *Cipollone,* —— U.S. at ——,

112 S.Ct. at 2621. The Court concluded that some of the common law claims were pre-empted and others were not. The significant aspect of the Court's holdings is that the gravamen of the pre-emption analysis was whether or not the common law claims were based on something that was not touched on by the federal regulation. Those claims that did not depend on regulated subject matter were not pre-empted.

The pre-emption inquiry is different in this case because Plaintiffs make no claims which are not covered by federal regulation. Unlike the Court in *Cipollone,* we are faced with state common law claims which are not expressly pre-empted but nevertheless rely upon subject mattter governed by federal regulations. Thus, the holdings in *Cipollone* are not controlling. *Cipollone* and this case would be the same if, in *Cipollone,* the only claim asserted was that the cigarette manufacturers were liable only because they had placed the warnings mandated by federal law on these packages.

The majority opinion also misconstrues the Supreme Court's opinion in *Easterwood.* The issue in *Easterwood* was whether state law claims of negligence with respect to warning devices at grade crossings and train operating speeds were pre-empted by the Federal Railroad Safety Act and regulations promulgated thereunder. The Court stated that the issue of pre-emption "depends on whether the regulations issued by the Secretary cover the subject matter of the two allegations, each of which we may assume states a valid cause of action." *Easterwood,* —— U.S. at ——, 113 S.Ct. at 1738. The Court concluded that federal speed limit regulations covered the subject matter of the common law of train speed, and thus expressly pre-empted the claim of excessive train speed. *Id.,* —— U.S. at ——, 113 S.Ct. at 1742.

With respect to the negligence claim about use of particular warning devices at grade crossings, the Court found that the applicable federal regulations did not cover the

same subject matter as the common law tort claims and concluded that the grade crossing claim was not pre-empted. *Easterwood,* —— U.S. at ——, 113 S.Ct. at 1742. After analyzing the federal regulations in its express pre-emption inquiry, the Court rejected petitioner's claim of implied conflict pre-emption "on the basis of the preceding analysis." *Id.,* —— U.S. at —— n. 12, 113 S.Ct. at 1742 n. 12. The majority reads this statement as reinforcing "the commands of *Cipollone* that where there is an express pre-emption provision, it is to be the alpha and omega of pre-emption analysis" because the Court did not conduct a separate implied pre-emption analysis after its express pre-emption probe. I believe that the Court did not conduct an implied conflict pre-emption analysis because, "on the basis of the preceding analysis," it found no conflict between the federal regulations and the common law negligence claim.

Unlike the factual scenarios considered by the Supreme Court in *Cipollone* and *Easterwood,* this case involves only state law claims that impose legal duties predicated on subject matter squarely governed by federal regulations. Standard 121 governs brake equipment that manufacturers may install on trucks and Plaintiffs' common law claims focus exclusively on the type of brake equipment installed by the manufacturers. I agree with the majority that we are bound by *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir.1989), *cert. denied,* 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990), and its holding that the Safety Act does not expressly pre-empt a common law tort claim regarding equipment installed on a vehicle where a NHTSA regulation affords the manufacturer an option between types of permissible equipment. Therefore, only the doctrine of implied pre-emption remains to resolve the conflict between Plaintiffs' claims of negligence for failure to install antilock brakes and Standard 121 which permits the installation of air-brake systems.

In *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir.1993), a prior panel of this court anticipated this scenario. *Lake Aircraft* involved a common law product liability claim of defective design of an airplane seat for failure to use an energy absorbing design. The applicable federal regulation stated that *if* manufacturers employed energy absorbing designs, the designs must comply with certain specifications. The seat at issue was not energy absorbing, but otherwise complied with federal regulations. After determining that the express pre-emption clause was inapplicable to matters covered by the tort claims, the court found no conflict between the federal regulation and the state law tort claims. Specifically, the court stated:

> Some question seems to exist about what should be concluded when a state regulation which lies outside the scope of an express pre-emption provision (which, under *Cipollone,* implies that the state law is *not* pre-empted) nonetheless *actually* clashes with federal law (which traditionally has implied that the state law is pre-empted).
>
> But the case we decide today presents no actual conflict. Federal aircraft design regulations did not require, but did *permit* manufacturers to use energy absorbing designs, such as the laced, cut-out portion featured in the pilot seat of the aircraft in this case. [Appellant] seeks to hold defendants liable for errors of omission: he claims defendants should have exceeded the minimum federal standards for aircraft design, but failed to do so. *Appellant does not contend defendants are liable, under state law, for an act of compliance with a federal requirement, nor does he challenge defendant's choice between two federally approved options analogous to the federal standards in the airbag cases. Cf. Taylor v. General Motors Corp.* (federal law mandated use of *either* seatbelts *or airbags,* so state law action with effect of

requiring airbags took away the belts-only option and was impliedly pre-empted).

Lake Aircraft, at 295 n. 5. (some emphasis added) (citations omitted). In contrast to *Lake Aircraft*, the case at bar does involve a challenge to a manufacturer's choice between two federally approved options analogous to the federal standards in *Taylor*.

As the Supreme Court acknowledged in *Cipollone*, the Supremacy Clause mandates that state law that conflicts with federal law is "without effect." Plaintiffs' common law negligence claims in this case depend on a finding that the manufacturers violated a duty, imposed by state law, of reasonable care by installing airbrake systems on the trucks at issue. Indeed, the trial judge would have to instruct the jury that state law required the jurors to determine if the manufacturers should be held liable for failing to include antilock brakes on the trucks. Standard 121 expressly permits the inclusion of airbrakes on trucks and trailers. The assertion of state law claims which would forbid the manufacture of brakes expressly permitted by federal law is a classic conflict where, under the Supremacy Clause, federal law must prevail. The conflict in this case is unavoidable—Plaintiffs assert state law said to forbid doing that which federal law permits.

State common law is law that may conflict with federal law just the same as state statutory law. In *Cipollone*, the Supreme Court faced the question of the scope of the phrase "no requirement or prohibition" and stated that the phrase "sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Cipollone*, —— U.S. at ——, 112 S.Ct. at 2620. The Court continued by quoting an earlier case: "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay

compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.*, —— U.S. at ——, 112 S.Ct. at 2620, *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959). Thus, the effect of a prevailing claim of common law negligence for failure to equip the trucks with antilock brakes would be the same as if the State of Georgia enacted a statute saying that a manufacturer cannot sell for use in Georgia any truck without antilock brakes.[1] As noted above, Standard 121 expressly permits manufacturers to install airbrake systems on trucks and trailers. If the Supremacy Clause means anything, it must mean that federal law prevails in this conflict.

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[1] Indeed, the legislature of the State of Georgia expressly adopted the common law as it stood on May 14, 1776 as binding law of Georgia. Georgia Code of 1863, § 1, ¶ 6. Thus, common law is Georgia law through legislative action. Furthermore, the Constitution of the state of Georgia expressly ratified and affirmed decisional law of Georgia and imbued court decisions with the force of law. *See* GA. CONST. art. XI, § 1, ¶ 3 (1982).

APPENDIX B

[Filed Mar. 26, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:91-CV-0465-JOF

BEN MYRICK, *et al.*,
Plaintiffs,
vs.
FRUEHAUF CORPORATION, *et al.*,
Defendants.

ORDER

This matter is before the court on defendant Freightliner Corporation's motion for summary judgment on grounds that plaintiffs' state law claims are preempted by federal law. Both parties have requested oral argument. However, because there are no disputed facts and disposition of defendant's motion turns purely on legal grounds, the request for oral argument will be DENIED.

I. FACTS

The following facts are undisputed. On February 6, 1989 a truck operated by Munson Transportation, Inc., collided with a vehicle being driven by plaintiff, Ben Myrick, on U.S. Highway 441 in Morgan County, Georgia. The Munson truck tractor was manufactured by defendant Freightliner Corporation. Its trailer was manufactured by defendant Fruehauf Corporation. Neither the truck nor trailer were equipped with anti-lock braking devices. Plaintiff seeks damages under state tort law on account of this alleged defect.

II. APPLICABLE LAW

Defendant Freightliner moves for summary judgment on grounds that plaintiff's state law tort claims are preempted by Standard Number 121, 49 C.F.R. § 571.121, promulgated under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (hereinafter "Safety Act"). Standard 121 regulates air braking systems used on trucks, trailers, and buses.

Plaintiffs ask the court to treat Freightliner's motion for summary judgment as a motion to dismiss because no factual or evidentiary questions are involved.[1] It is true that defendants could have raised the preemption issue in a timely-filed motion to dismiss. However, it is also appropriate to consider preemption issues on summary judgment. *See, e.g., Papas v. Upjohn Co.*, 926 F.2d 1019, 1020 (11th Cir. 1991) (preemption of state law claims by federal pharmaceutical labeling regulations); *see also Crowe v. Fleming*, 749 F. Supp. 1135, 1137 (S.D. Ga. 1990) and cases cited therein. Defendants' motion will be treated as one for summary judgment.

A. *National Traffic and Motor Vehicle Safety Act*

The Safety Act contains both a preemption clause and a savings clause. The preemption clause provides,

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of the State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance as such

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[1] The court notes that plaintiff's brief was filed in violation of this court's case instructions. Plaintiff's brief exceeded the court's page limit by eight pages. Plaintiffs also failed to index their brief. Had this violation come to the court's attention earlier, by motion of the defendants or otherwise, plaintiffs' brief would have been stricken from the record.

> vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The savings clause provides, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c).

B. *Standard 121*

When it was originally adopted, certain provisions of Standard 121 imposed stopping distance requirements that could only be met through the installation of anti-lock braking devices. However, in *Paccar, Inc. v. National Highway Traffic Safety Administration*, 573 F.2d 632 (9th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978), the Ninth Circuit ruled that the provisions of Standard 121 requiring heavier axles and anti-lock devices on trucks and trailers should be suspended. *Id.* at 643.[2] Following *Paccar*, the National Highway Traffic Safety Administration amended section 3 of Standard 121 to provide "notwithstanding any language to the contrary, sections S5.3.1, S5.3.1.1, S5.3.2, S5.3.2.1, S5.3.2.2, S5.7.1, S5.7.3(a), S5.7.3(b) of this standard are not applicable to trucks and trailers . . . ." However, those provisions were left in the standard so that they could be

> easily reinstated when suitable solutions to the requirements laid down by the Court are found. In addition, by retaining the standard's language in its entirety in its existing form, manufacturers are made aware of what the agency still considers to be reasonable standards for minimum acceptable performance, and those manufacturers that wish to construct their vehicles in accordance with the non-mandatory

[2] Although the regulation did not specifically require anti-lock braking systems, "as a practical matter and beyond doubt, that anti-lock was necessary to meet the standard." *Paccar*, 573 F.2d at 643 n.26.

> sections of the standard will have the necessary guidance to do so.

44 F.R. 46849 (1979). Thus, after Paccar and the amendment to Standard 121, installation of anti-lock braking devices is clearly "optional." The unstated but inescapable corollary is that manufacturers may comply with Standard 121 by opting to produce trucks and trailers without anti-lock devices.

C. *Implied Preemption*

Relying on *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), defendants argue that plaintiffs' state statutory and common law claims are "impliedly preempted" by Standard 121. In *Taylor*, the court reviewed the principle of implied preemption:

> Our analysis begins with the principle that federal law preempts state law when the state law creates "a potential frustration of the administrative scheme provided by [the federal law]," *Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1562 (11th Cir. 1983), or when the state law "interferes with the methods by which the federal statute was designed to reach [its] goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805, 813, 93 L.Ed.2d 883 (1987).

The court held that plaintiff's state tort law claim against the defendant automobile manufacturers for failure to equip vehicles with air bags was "impliedly preempted by the Safety Act."[3]

[3] In *Taylor* the court reviewed the three types of federal preemption.

> First, Congress, in drafting a statute, may use language and dictates the extent to which the statute preempts state law. Second, despite the absence of such language, the wording of the statute or its legislative history may evince Congress' intention to occupy giving regulatory field to the exclusion of

The principle of implied preemption applies whether the federal law is embodied in a statute or regulation, *see Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (holding that "[f]ederal regulations have no less pre-emptive effect than federal statutes"), and whether the state law is rooted in a statute, regulation, or common law rule. State common law claims are pre-empted because "the duties imposed through state common law damage actions have the effect of requirements that are capable of creating an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Stephen v. American Brands, Inc.,* 825 F.2d 312, 313 (11th Cir. 1987) (adopting decision and reasoning of *Cipollone v. Liggett Group, Inc.,* 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied,* 479 U.S. 1043, 107 S. Ct. 907, 93 L.Ed.2d 857 (1987).

The *Taylor* court noted that there is no strong presumption against implied preemption and that preemptive intent may be inferred solely from effects. 875 F.2d at 826. "Where the preemptive intent behind the federal regulatory scheme is unclear from its statutory language or legislative history, the federal law nevertheless pre-empts the state law to the extent that ordinary application of the two laws creates a conflict." *Id.* (citing *Brown v. Hotel & Restaurant Employers & Bartenders International Union,* 468 U.S. 491, 501 (1984)).

In *Taylor* the applicable regulation allowed manufacturers to choose between manual seat belts and auto-

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state law. Third, even when Congress has not occupied the entire regulatory field, federal law nevertheless may implicitly preempt state law to the extent that state law conflicts with federal regulatory scheme. [Cites omitted].

Taylor, 875 F.2d at 822. The court found that the third type of preemption applied. *Id. See English v. General Electric,* —— U.S. ——, 110 S.Ct. 2270, 2275 (1990); *Easterwood v. CSX Transp., Inc.,* 933 F.2d 1548, 1552 (11th Cir. 1991).

matic passive restraint systems. Reviewing the pertinent Supreme Court cases, the court held that "a state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'" 875 F.2d at 827 (citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 318 (1981). "[A] state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option." *Id.* at 827; *see Fidelity Federal Savings & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 155 (1982) (California common law rule that due on sale clauses were unenforceable was preempted by federal regulation that permitted but did not compel the use of due on sale clauses).

Plaintiffs attempt to distinguish *De la Cuesta,* arguing that there was no savings clause in that case. However, the Act's savings clause is not a bar to implied preemption. *Taylor,* 875 F.2d at 827 n.20.[4] *See also Kitts v. General Motors Corp.,* 875 F.2d 787, 789 (10th Cir. 1989); *Pokorny v. Ford Motor Co.,* 902 F.2d 1116, 1124 (3d Cir. 1990) (allowing manufacturer choice of restraint systems was an essential element of regulatory framework and preempted common law product liability claims); *Crowe v. Fleming,* 749 F. Supp. 1135 (S.D. Ga. 1990). The savings clause would protect a cause of action alleging that some component of a braking system was defective if the overall system met the performance

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[4] The court stated,

We reject the appellant's argument that the Safety Act savings clause forecloses a finding of implied preemption. *See Wood v. General Motors Corp.,* 865 F.2d 395, 415-16 (1st Cir. 1988) (citing *International Paper Co. v. Ouellette,* 479 U.S. 481, 107 S. Ct. 805, 93 L.Ed.2d 883 (1987), and *Texas & Pacific Railway v. Abilene Cotton Oil Co.,* 205 U.S. 426, 27 S. Ct. 350, 51 L.Ed. 553 (1907), for the proposition that "general" savings clause, such as that contained in the Safety Act, does not preclude a finding of implied preemption).

and design criteria in Standard 121. However, plaintiffs' claim is based on an allegation that defendants should have installed another type of braking system, not that some part of the system actually installed was inherently defective.

Even if the court were to assume, which it does not, that plaintiffs are correct in contending that the failure to install anti-lock devices constituted negligence or resulted in an inherently defective product, allowing plaintiffs' state statutory or common law claims to proceed in this action would, in effect, establish a performance standard stricter than those set forth in Standard 121. Such a result is prohibited by 15 U.S.C. § 1392(d) (state safety standards not identical to federal standards are preempted). *See Taylor*, 875 F.2d at 827 n.20; *Wood v. General Motors Corp.*, 865 F.2d 395, 402 (1st Cir. 1988) (followed in *Taylor*); *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989) (following *Wood*).

In *Crowe v. Fleming, supra,* the court held that a common law claim based on failure to install reflective tape on the side of a trailer was preempted because the theory of recovery was in conflict with the method chosen by Congress to accomplish the goals of the Act and because the theory directly addressed the same aspect of performance. As in the case at bar, the standards regulated but did not require use of reflective tape. The court concluded that to allow the claim would establish a state regulation requiring use of reflective material.

Plaintiffs argue that *Taylor* may be distinguished because the regulation at issue there required manufacturers to choose between specified restraint systems while Standard 121 contains no federally mandated options. Plaintiffs contend that the exemption of trucks and trailers from the regulation's provisions regarding anti-lock brakes amounts to no regulation of anti-lock braking devices and, therefore, there is no conflict with state law.

However, the focus of plaintiffs' argument is too narrow. The question is not whether anti-lock braking devices are regulated by Standard 121 but whether the design and performance of truck and trailer air brake systems in general are regulated by the statute. If so, state law may not impose stricter or conflicting standards.

Only those parts of Standard 121 that would require the installation of anti-lock devices do not apply to trucks and trailers. Except for stopping distances, all other aspects of air brake systems on trucks and trailers are regulated by Standard 121, including: reservoirs; towing vehicle protection systems; pressure gauges and warning systems; brake actuation, release, and recovery times; deceleration rates and temperatures; parking brake systems; and road testing. Plaintiffs' claim that truck and trailer braking systems are no longer regulated after *Paccar* is untenable.

The amendment of Standard 121 to conform with the court's decision in *Paccar* was intended to preserve the option of *not* installing anti-lock braking devices until such devices had been improved and subjected to further testing. Deletion of the provisions that would have required anti-lock devices was intended to *promote* safety. Plaintiff's theory that failure to install such devices results in an inherently unsafe system directly conflicts with the purpose behind the amendment of Standard 121. Not only would a common law standard requiring the installation of anti-lock devices conflict with the federal standard, it would defeat the policy behind the Safety Act by imposing a design requirement that the Department of Transportation judges to be unsafe, having chosen not to require such devices until they are more reliable.

Plaintiffs' final argument is that the court's decision in *Taylor* is flawed and should not be followed. Plaintiffs are in effect asking this court to overrule the Eleventh Circuit. The court suggests that plaintiffs' counsel con-

sult a basic textbook on civil procedure or practice in the federal courts.

III. CONCLUSION

Defendants' motion for summary judgment [10-1] is GRANTED. The court DENIES both parties' request for oral arguments on the motion.

Although defendant Fruehauf Corporation did not join in Freightliner Corporation's motion for summary judgment, it appears that those claims are also subject to preemption for the reasons set forth above. Defendant Fruehauf is therefore GRANTED LEAVE to file a motion for summary judgment within ten (10) days of the entry of this order. While the motion must meet the requirements of Local Rule 220-5, Fruehauf need only show that the principles set forth above also apply to plaintiff's claim against it.

Plaintiffs shall have ten (10) days to respond to the motion. Plaintiffs' response should likewise be limited to showing that plaintiffs' claims against defendant Fruehauf should not be preempted. However, the court will not reconsider the legal issues resolved above. Both plaintiffs and defendants' briefs should be limited to five (5) pages.

SO ORDERED this 26th day of March, 1992.

/s/ J. Owen Forrester
J. OWEN FORRESTER
United States District Judge

APPENDIX C

[Filed May 20, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:91-CV-0465-JOF

BEN MYRICK and EMILY MYRICK,
Plaintiffs,

vs.

FREUHAUF CORPORATION and
FREIGHTLINER CORPORATION,
Defendants.

ORDER

This matter is before the court on plaintiffs' motion to modify its March 26, 1992 order granting summary judgment to defendant Freightliner Corporation. Plaintiff asks the court to delete footnote 1 and the last paragraph on page nine of that order.

Footnote 1 noted that plaintiff's brief exceeded the page limit contained in this court's *Case Instructions* and that the brief was not indexed, as required by those instructions. Plaintiffs note that there are no case instructions in the Federal Rules of Civil Procedure or the Local Rules for the Northern District of Georgia. Plaintiffs ask the court to delete footnote 1 because it is "unnecessary to the decision and disparaging."

The court's records indicate that all parties in the above-styled action were mailed a copy of a document entitled "*CASE INSTRUCTIONS:* BY THE ORDER OF

THE HONORABLE J. OWEN FORRESTER" in March of 1991. Footnote 1 of those instructions states "These instructions supplement the 1985 Local Rules of the Court . . . ." Paragraph 2 of those instructions limits briefs to twenty-five pages and requires all briefs in excess of fifteen pages to be indexed. Nonetheless, the court read and considered each and every page of plaintiffs' brief. The court encourages counsel for all parties to read carefully and to follow directions from the court.

The last paragraph on page 9 of the court's previous order states,

> Plaintiffs' final argument is that the court's decision in *Taylor* [*v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989)] is flawed and should not be followed. Plaintiffs are in effect asking this court to overrule the Eleventh Circuit. The Court suggests that Plaintiffs' counsel consult a basic textbook on civil procedure or practice in the federal courts.

Plaintiffs argue that Fed. R. Civ. P. 11 gives them permission to make a good faith argument for "the modification, or reversal of existing law . . . ." While the court shares some of plaintiffs' concerns about bureaucratic preemption of state tort law, this court and those who practice before it are bound by existing law as established and interpreted by the Eleventh Circuit Court of Appeals. The proper forum for arguing that *Taylor* is flawed is before that court. Plaintiffs' counsel must be aware that a federal district court is without jurisdiction to modify or reverse the decisions of a federal appellate court.

Plaintiffs' motion for modification of the court's March 26, 1992 order [24-1] is DENIED.

The court allowed defendant Freuhauf corporation ten days to file a motion for summary judgment. Subsequent to submission of defendant Freightliner Corporation's motion for summary judgment, the parties filed a dismissal

of plaintiffs' claims against defendant Freuhauf Corporation with prejudice. The Clerk of Court is, therefore, DIRECTED to enter FINAL JUDGMENT in favor of defendants and DISMISS this action.

SO ORDERED this 19th day of May, 1992.

/s/ J. Owen Forrester
J. OWEN FORRESTER
United States District Judge

APPENDIX D

[Filed Mar. 30, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:91-cv-1128-MHS

JACK LINDSEY, Executor of the Estate of GRACE C. LINDSEY, Deceased, and JACK LINDSEY, as Surviving Spouse of GRACE C. LINDSEY, Deceased,
Plaintiff,

v.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP. and INTERNATIONAL HARVESTER COMPANY,
Defendants.

ORDER

This matter is before the Court on defendant Navistar International Transportation Corporation's motion for summary judgment. For the reasons stated below, the Court will grant defendant's motion.

This is a wrongful death action arising out of the an automobile accident in which Grace C. Lindsey was killed. On September 5, 1989, a truck operated by Tim Williams collided with a vehicle driven by Grace C. Lindsey on U.S. Highway 41 in Oconee County, Georgia. The truck tractor was manufactured by defendant Navistar International Transportation Corporation ("Navistar") in 1982. Neither the truck tractor nor trailer was equipped with an antilock braking system.

Plaintiff brought this action on theories of strict liability and negligence, alleging that defendant Navistar should have equipped the tractor with an antilock brake system. Defendant Navistar has moved for summary judgment on the grounds that plaintiff's state law tort claims are preempted by federal law, specifically, Standard Number 121, 49 C.F.R. § 571.121, promulgated pursuant to the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 ("the Act"). Standard 121 regulates air braking systems used on trucks, buses, and trailers.

This issue was recently considered in *Myrick v. Fruehauf Corporation,* 1:91-cv-0465-JOF (March 26, 1992). *See* Appendix A. In *Myrick,* Judge Forrester held that the Act and Standard Number 121 impliedly preempted state law claims of negligence and strict liability. Judge Forrester found that Standard 121 gives manufacturers the option of *not* installing an[ti]-lock braking devices and that any common law rule requiring otherwise would conflict with the federal standard. This Court finds persuasive and adopts as its reasoning Judge Forrester's opinion in *Myrick*.

Accordingly, the Court GRANTS defendant Navistar's motion for summary judgment [#7-1], DENIES defendant's request for oral argument [#8-1], and DIRECTS the clerk to enter judgment in favor of defendant Navistar.

IT IS SO ORDERED, this 27th day of March, 1992.

/s/ Marvin H. Shoob
MARVIN H. SHOOB
Senior Judge
United States District Court
Northern District of Georgia

APPENDIX E

[Filed May 18, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8386

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

versus

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

No. 92-8387

JACK LINDSEY, Executor of the Estate of GRACE [C.] LINDSEY, Deceased, JACK LINDSEY, as Surviving Spouse of GRACE C. LINDSEY, Deceased,
Plaintiff-Appellant,

versus

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Defendant-Appellee,

INTERNATIONAL HARVESTER COMPANY,
Defendant.

No. 92-8536

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

versus

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed James
United States Circuit Judge

APPENDIX F

[Filed Jul. 15, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8386

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

versus

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

No. 92-8386

JACK LINDSEY, Executor of the Estate of GRACE C. LINDSEY, Deceased, JACK LINDSEY, as Surviving Spouse of GRACE C. LINDSEY, Deceased,
Plaintiff-Appellant,

versus

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Defendant-Appellee,

INTERNATIONAL HARVESTER COMPANY,
Defendant.

No. 93-8536

BEN MYRICK and EMILY MYRICK,
Plaintiffs-Appellants,

versus

FREUHAUF CORPORATION,
Defendant,

FREIGHTLINER CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER

(✓) The motion of Appellees, Freightliner Corp., et al. for a further stay of the issuance of the mandate is GRANTED to and including August 16, 1994, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Appellees, Freightliner Corp., et al. for a further stay of the issuance of the mandate is DENIED.

/s/ Ed James
United States Circuit Judge

FILED
SEP 19 1994
OFFICE OF THE CLERK

No. 94-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,

Petitioner,

v.

BEN MYRICK and EMILY MYRICK,

Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Petitioner,

v.

JACK LINDSEY, EXECUTOR OF THE ESTATE AND SURVIVING SPOUSE OF GRACE C. LINDSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals err in holding that the National Traffic and Motor Vehicle Safety Act and Federal Motor Vehicle Safety Standard 121 promulgated thereunder do not preempt Respondent's common law claims of defective brake design when:

(a) the Safety Act does not explicitly state that common law tort claims are preempted, and

(b) the Safety Act expressly saves common law liability claims.

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No. 94-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,

Petitioner,

v.

BEN MYRICK and EMILY MYRICK,

Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Petitioner,

v.

JACK LINDSEY, EXECUTOR OF THE ESTATE AND SURVIVING SPOUSE OF GRACE C. LINDSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Ben and Emily Myrick and Jack Lindsey, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners Freightliner Corporation and Navistar International Transportation Corporation, because applicable law has settled the

issue. Based on this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), and on part of its own decision in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), the Eleventh Circuit held that the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§1381-1431, does not preempt Respondents' common law claims.

STATEMENT OF THE CASE

Relying on *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), and the interpretation of that decision by at least eight of its sister circuits, a majority panel of the court of appeals held that Respondents' common law claims of defective brake design based upon the absence of antilock brakes, were not preempted by the National Traffic and Motor Vehicle Safety Act, i.e. that Congress did not intend to preempt these claims by enactment of the Safety Act. In *Taylor v. General Motor Corp.*, 875 F.2d 816 (11th Cir. 1990) *cert. denied*, 494 U.S. 1065 (1990), the Eleventh Circuit had previously held that, although the Safety Act did not expressly preempt plaintiff's common law "no airbag" claim, the act impliedly preempted it. The court of appeals reached its decision by applying the clear guidelines of *Cipollone*. Superimposing the *Cipollone* decision over the *Taylor* decision, the court found that the implied preemption part of *Taylor* was superseded by *Cipollone's* clear instruction that "when there is an express preemption provision we should not consider implied preemption." Pet. App. 11a. Since the express preemption analysis of *Taylor* was unaffected by *Cipollone*, the court determined that "[f]actoring *Cipollone* into *Taylor* produces a net result of no pre-emption in this case." Pet. App. 11a.

A. Federal Law Background

The National Traffic and Motor Vehicle Safety Act was enacted due to Congressional concern over the rising highway accident rate, the loss of lives and property due to accidents, and the tendency of the automobile industry to concentrate on cosmetic design to the detriment of safety design. This is evidenced by the Act's congressional declaration of purpose: "Congress hereby declares that the purpose of this Act is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. §1381. (For consistency, we also cite to the codification used in the courts below and in all the opinions on the issue).

Pursuant to the authority of the Safety Act, the National Highway Transportation Safety Administration (NHTSA) establishes federal motor vehicle safety standards. *Id.* §1392(a). These standards are minimum standards for motor vehicle performance, or motor vehicle equipment performance. *Id.* §1391(2). The standards do not dictate to manufacturers how to design their vehicles or vehicle equipment. The manufacturers have discretion as to the design which will be used to meet the performance criteria. Manufacturers must certify compliance with the performance requirements in order to sell their vehicles and equipment. *Id.* §§1397-(a)(1)(A) and §1403. The Safety Act simply determines whether or not a vehicle can legally be sold in the United States.

The Safety Act contains two provisions which explicitly state Congress' intention with regard to state law. The first provision, which is referred to as the "preemption provision" states:

> **Supremacy of federal standards; allowable higher standards for vehicles used by Federal or State governments.** Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

Id. §1392(d). The other provision is called the "savings clause" and it provides:

> **Continuation of common law liability.** Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Id. §1397(k). The plain language of these provisions demonstrate a Congressional intent to exclude only non-identical state motor vehicle standards covering the same aspect of performance as a federal standard, while preserving state regulations where there is no federal regulation in effect, or where the state standard is identical to the federal standard, or where the state regulations

apply to a different aspect of performance than the federal standard, or where state government vehicles are involved. The provisions clearly show that Congress did not intend to preempt common law liability. The fact that state governments could require more stringent safety standards in vehicles for its own use shows that the standards were not intended to be exhaustive, but that they were indeed minimum standards.

The NHTSA regulations governing the performance of truck air brakes are set forth at 49 C.F.R. §571.121 (Standard 121). The purpose of Standard 121 is "to insure safe braking performance under normal and emergency conditions." 49 C.F.R. §571.121 S2. Part 121 was the subject of a lawsuit in the 1970's. The standard required "vehicles to stop within certain distances, from certain speeds, without leaving a 12-foot wide lane, and without lockup of any wheel more than momentarily." *Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632, 636 (9th Cir.), *citing* 35 Fed. Reg. 10,368 (1970) (trucks and buses) and 35 Fed. Reg. 10,456 (1970) (trailers), *cert. denied*, 439 U.S. 862 (1978). The *Paccar* court found that antilock brakes were necessary to meet the standard. *Paccar*, 573 F.2d at 639 n.26.[1] The standard had been amended numerous times,

---

[1]The *Paccar* court's finding that the regulation effectively required a manufacturer to equip its trucks with antilock brake systems does not alter the fact that the standard sets performance criteria leaving to the manufacturers the choice of appropriate brake system designs.

The agency has recently explained the functioning and history of antilock brake systems (ABS) in a comprehensive notice of proposed rulemaking:

> . . . Heavy vehicles are typically designed to achieve their best braking performance when operating in the fully loaded condition. Accordingly, a vehicle with a brake system

[footnote continued]

particularly in regard to increasing stopping distances. These amendments were the result of industry protestations. Eventually, the industry challenged the regulation, and the Ninth Circuit found that, although NHTSA was justified in promulgating a standard requiring improved air brake systems and stability mechanisms for the industry, because of unforeseen problems in mass production the standard was "neither reasonable nor practicable *at the time it was put into effect.*" *Paccar,* 573 F.2d at 640. (Emphasis added). The court ordered NHTSA to suspend the antilock requirement of the standard. *Id.* at 643. However, the court's decision was not based on a finding that the antilock requirement was unsafe; rather, the decision was based on NHTSA's failure

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designed to operate ideally in the full loaded condition has a tendency to lockup one or more of its axles prematurely (i.e., one axle will lockup before other axles achieve maximum braking) when operating in the lightly loaded conditions, especially when operating on slippery roads.

. . .

ABS helps prevent loss of control situations by automatically controlling the amount of braking pressure applied to a wheel. . . . When operating at loads significantly below the fully loaded condition or on slippery road conditions, vehicles equipped with ABS usually obtain shorter stops because braking efficiency is enhanced.

. . .

Development work on ABS for heavy vehicles began in the 1950s with commercial products available in the late 1960s. . . . As a result of these requirements [of Standard 121], approximately one million air-braked trucks, buses, and trailers were equipped with ABS in the late 1970s.

. . .

Nevertheless, the data, although imperfect, indicates that brake induced instability is a significant contributing factor to truck crashes.

57 Fed. Reg. 24212; 24214 (1992).

to present evidence that the results of its rulemaking on vehicles in use did not create a greater danger to the public. *Id.* at 642-43.

After the *Paccar* decision, NHTSA made several attempts to explain its interpretation of the case and finally amended the standard to exempt trucks and trailers from the antilock and related requirements. *See* 44 Fed. Reg. 46,849 (1979). The "application provisions" of the standard state that "[t]his standard applies to trucks, buses and trailers equipped with air brake systems." The amendment added the following:

> Notwithstanding any language to the contrary, sections S5.3.1, S5.3.1.1, S5.3.2, S5.3.2.1, S5.3.2.2, S5.7.1, S5.7.3(a) and S5.7.3(b) of this standard are not applicable to trucks and trailers . . .

49 C.F.R. §571.121 S3.

The amendment to the standard was *not* a deliberate choice by the agency not to require antilock brakes for trucks on the basis of safety and practicability as Petitioners contend. The agency explained its actions:

> The agency is amending the application section of the standard to state that trucks and trailers need not comply with certain paragraphs of the regulation. The regulation is being amended in this manner rather than deleting or revising the wording of each of the affected sections in order to disturb the actual test of the standard as little as possible. In that way, the affected sections can most easily be reinstated when suitable solutions to the requirements laid down by the Court are found. In addition, *by retaining the standard's language in its existing form, manufacturers are made aware of what the agency still considers to be reasonable standards for minimal acceptable performance, and those manufacturers that wish to construct their vehicles in*

accordance with the non-mandatory sections of the standard will have the necessary guidance to do so.

44 Fed. Reg. 46,849 (1979). (Emphasis added).

After *Paccar,* U.S. manufacturers chose to halt development and production of antilock brake systems on heavy vehicles. 57 Fed. Reg. 24,212, 24,213 (1992).[2]

B. Statement Of Facts

On February 6, 1989, a tractor-trailer was southbound on a wet highway in Morgan County, Georgia. The driver applied the brakes because of traffic ahead. The brakes locked and caused a jackknife whereby the trailer skidded into the path of a northbound tractor-trailer driven by Respondent Ben Myrick. The impact tore the cab off Mr. Myrick's rig. Mr. Myrick suffered closed head injuries, abdominal injuries, and spinal injuries; he is permanently paraplegic and brain damaged. His wife, Respondent Emily Myrick has lost the companionship and consortium of her husband. Neither the tractor nor the trailer that collided with Mr. Myrick's vehicle had antilock braking devices.

The tractor-trailer rig that jackknifed into the path of Grace Lindsey had no antilock devices either. On September 5, 1989, the rig was proceeding south on a highway in Oconee County, Georgia, when the driver applied the brakes because of a car stopped in front of it. Mrs.

[2]The industry's attitude toward the implementation of this safety feature mirrors the automobile industry's "war against the airbag." *See Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 48-50 (1980). The truck manufacturers won a major battle with their victory in *Paccar,* and are now attempting to win the war on the common law front. The irony that the manufacturers are relying on "no airbag" cases for their ammunition should not be lost on the Court.

Lindsey, who was driving northbound, was killed by the jackknifing tractor as it crossed into her lane of travel. Respondent Jack Lindsey is her surviving spouse.

REASONS FOR DENYING THE PETITION

For the first twenty years after the enactment of the Safety Act, the courts were virtually unanimous in holding that various common law claims were not preempted by the Safety Act. The courts uniformly rejected the manufacturers' argument that when they have complied with an applicable federal motor vehicle safety standard, they cannot be held liable for failing to do more. Rejecting the reasoning of courts which found preemption, (almost exclusively in airbag claims and by implied preemption), the Eleventh Circuit, under the guidelines of *Cipollone,* simply made a correct analysis of preemption under the Safety Act. While there may be some residual conflict among the district courts until their respective circuits courts decide post-*Cipollone* Safety Act cases, conflict between courts with regard to the Safety Act has always been allowed by this Court.

In following this Court's mandate from *Cipollone,* that the existence of an express preemption provision precludes implied preemption analysis, the court of appeals did not simply rely on its reading of one passage from the decision as Petitioners contend. The court examined how the other circuits had applied *Cipollone,* how this Court dealt with preemption post-*Cipollone,* and how cases decided by other panels within the Eleventh Circuit had been affected. Faced with these sources, the court made the only determination that it could – the Supreme Court meant what it said in *Cipollone.*

In factoring *Cipollone* into *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert denied,*

494 U.S. 1065 (1990), and determining that there is no preemption in this case, the court did not rely solely on the existence of the savings clause. Concerned with what Congress expressly stated about preemption, the court found that Congress had expressed its intent about preemption in both the preemption clause and the savings clause. These "clauses explicitly deal with what is and is not preempted." Pet. App. 21a. Congress has explicitly spoken with regard to preemption; thus, there is no need to infer congressional intent. In the portion of *Taylor* which was not affected by *Cipollone,* the court had already determined that the Safety Act does not expressly preempt common law claims, a finding consistent with the decisions of a vast majority of courts. That determination results from an express preemption analysis entirely consistent with this Court's federal preemption jurisprudence.

The language and legislative history of the Safety Act make it clear that Congress intended to preempt non-identical state motor vehicle safety standards. Common law damage claims, no matter what their regulatory effect, are not preempted. There is no federal/state conflict despite Petitioners' characterization of the common law claims in this case as regulations. Common law claims are not the "standards" that Congress is preempting in Section 1392(d), so there is no general conflict. Nor do the claims specifically conflict with the federal regulations where such regulations permit but do not require manufacturers to use certain designs.

A. There Is No Conflict Among the Courts Justifying Supreme Court Review.

Every federal and state appellate court to address the issue of preemption in the Act's first twenty years found that the Safety Act simply does not preempt common law claims. Beginning with *Larson v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the courts have concluded, outside of the context of passive restraints, that Congress did not intend to preempt common law claims. *See, e.g., Knippen v. Ford Motor Co.*, 178 U.S. App. D.C. 227, 546 F.2d 993, 1000 (D.C. Cir. 1976); *United States v. General Motors Corp.*, 171 U.S. App. D.C. 27,518 F.2d 420, 434 (D.C. Cir. 1975); *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3rd Cir. 1980) *cert. denied,* 450 U.S. 959 (1981); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Shipp v. General Motors,* 750 F.2d 418, 421 (5th Cir. 1985); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981) *cert. denied,* 459 U.S. 880 (1982); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Chrysler v. DOT,* 472 F.2d 659, 670 n.13 (6th Cir. 1972); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Fox v. Ford Motor Co.*, 575 F.2d 774, 784 (10th Cir. 1978); *General Motors Corporation v. Edwards,* 482 So.2d 1176, 1198 (Ala. 1985); *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 553, 132 Cal Rptr. 605, 609 (Cal. App. 1976); *Roberts v. May,* 41 Colo. App. 82, 583 P.2d 305, 308 (Colo. App. 1978); *Lollie v. General Motors Corp.*, 407 So.2d 613, 617 (Fla. App. 1981); *Volkswagen of America, Inc. v. Young,* 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (Mass. 1976); *McMullen v. Volkswagen of America,* 274 Or. 83, 545 P.2d 117, 120 (Ore. 1976); *Jackson v. Spagnola,*

349 Pa. Super. 471, 503 A.2d 944, 948 (Pa. Super. 1986); *Turner v. General Motor Corp.*, 514 S.W.2d 497, 505-06 (Tex. Civ. App. 1974); *Arbet v. Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431, 438 (Wis. 1975).[3]

Three circuits have held that "no-airbag" claims are preempted, all under an implied preemption analysis. *See Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied* 494 U.S. 1065 (1990); *Pokorney v. Ford Motor Co.*, 902 F.2d 116 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990).[4] The Eleventh Circuit had also determined that "no-airbag" claims were preempted. *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). Despite the conflict between these recent cases and those cases previously decided, this Court did not grant certiorari. Petitioners present no reason for the Court to abandon its understanding of conflicts between courts with regard to preemption under the Safety Act.

Furthermore, since the court of appeals' decision is based on the *Cipollone* rule that the existence of express preemption provisions precludes implied preemption, there is no longer any valid conflict among those circuit decisions (*Wood*, *Kitt*, and *Pokorny*) which were decided prior to *Cipollone*. Those decisions relied on an implied

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[3] While some of these cases do not use the word "preemption," it is clear that the preemption issue, compliance with federal safety standards as dispositive of liability issues, is being addressed.

[4] Despite these decisions, the circuit courts have adhered to a no preemption determination in cases not involving "no airbag" claims, *See Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992); *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3rd Cir. 1992).

preemption analysis, an analysis which is no longer valid under *Cipollone*, because of the Safety Act's explicit preemption provisions. Since these courts have all previously determined that the Safety Act did not expressly preempt common law claims, if they properly follow *Cipollone*, they should reach the same conclusion as the Eleventh Circuit. For them to rule otherwise would be inconsistent with their findings of no express preemption. This is especially true with regard to the Third Circuit, since *Cipollone* reversed a decision of the Third Circuit which had employed the same preemption analysis used in *Pokorny*.

The lower court decisions finding preemption since *Cipollone*, cited by Petitioners, should not influence this Court's decision on whether to grant the petition. Two of the cases, *Gills v. Ford Motor Co.*, 829 F.Supp. 894 (W.D.Ky. 1993) and *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993), do not even discuss *Cipollone*. The *state* court in *Boyle v. Chrysler Corp.*, 501 N.W.2d 565 (Wis. Ct. App. 1993), incorrectly concluded that Section 1392(d) included tort claims. The court in *Estate of Montag v. Honda Motor Co.*, 1994 WL 323650 (D.Colo. 1994), follows the present case in limiting its analysis to express preemption but then finds the "no airbag" claim expressly preempted, a decision in clear conflict with all prior Safety Act cases, even those that found preemption. Without any analysis, the court concluded that the common law claim constituted a nonidentical "safety standard," and improperly attributed to the savings clause a function already carried out by the preemption clause. *See Taylor*, 875 F.2d at 824 ("the preemption clause itself provides that where a federal standard does not govern 'the same aspect of performance' as the state standard, the state standard is not preempted"). The district court in *Tammen v.*

General Motors Corp., 1994 WL 383158 (D.Kan. 1994), merely deferred to the appellate court: "If *Cipollone* overrules *Kitts*, it is up to the Tenth Circuit to say so."[5] No conflicts requiring Supreme Court review exist among the lower courts.

B. The Court of Appeals Correctly Held that Respondents' Claims Are Not Preempted

The Court of Appeals interpreted *Cipollone* to hold that where a federal statute contains an express preemption clause which provides a reliable indicium of congressional intent with respect to state authority, a court should not consider implied theories of preemption. Pet. App. 9a-10a, *citing Cipollone*, 112 S.Ct. at 2618. In support of this interpretation, the court found that at least eight of its sister circuits had reached the same conclusion with regard to the meaning of *Cipollone*. Pet. App. 11a-12a.

The court also found supports for its interpretation in the decisions of two other Eleventh Circuit panels. *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991) (*Papas I*) and *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993). In *Papas I*, the Federal Insecticide, Fungicide, and Rodenticide Act was held to impliedly preempt certain claims. The Supreme Court vacated and remanded that decision for further consideration

[5] For district court cases relying on *Cipollone* and the present case and finding no preemption, *see Loulos v. Dick Smith Ford, Inc.*, 1994 WL 226676 (Mo. App. 1994); *Harris v. Ford Motor Co.*, No. 93-5248 (C.D. Cal. Aug. 22, 1994); *Byrnes v. Honda Motor Co. Ltd.*, 845 F.Supp. 875 (S.D. Fla.) (court had already denied defendant's motion but issued amended order reanalyzing decision in light of *Myrick*); *Constant v. Kawasaki Motors Corp.*, 845 F.Supp. 170 (M.D.Fla. 1994).

in light of its *Cipollone* decision. *Papas v. Zoecon Corp.*, 112 S.Ct. 3020 (1992). On remand, the case was decided solely on express preemption grounds. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (*Papas II*). Pet. App. 12a-13a. In *Lake Aircraft*, the district court's finding of implied preemption was reversed. Citing *Cipollone*, the court held that the Federal Aviation Act and its aircraft design standard regulations did not preempt a state common law action for the negligent or defective design of an aircraft, even though the aircraft complied with federal standards. Pet. App. 13a.

Further support for respondents is found in this Court's post *Cipollone* preemption decision, *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732 (1993). The *Easterwood* Court rejected petitioner's claim of implied "conflict" preemption and did not conduct a separate implied preemption analysis where the common law claim for absence of warning devices at grade crossings was not barred under the explicit preemption provision of the Federal Railroad Safety Act. Pet. App. 16a-17a.[6]

Petitioners incorrectly argue that the *Cipollone* rule is inapplicable to the Safety Act. Citing *Wood*, 865 F.2d at 414, Petitioners contend the First Circuit assumed the validity of the principle of no implied preemption, but found it inapplicable to the Safety Act. This is not accurate. The *Wood* court discussed the "principle" that a savings clause precludes implied preemption analysis; however, this "principle," is neither the principle established by *Cipollone*, nor the one relied on by the

[6] The Eleventh Circuit's interpretation of *Cipollone* is also consistent with the interpretation attributed to the majority opinion by the dissent. See *Cipollone*, 112 S.Ct. at 2633. (Scalia, J. dissenting in part).

Eleventh Circuit. The Eleventh Circuit found that the Safety Act contained a preemption clause and a savings clause, which provided a reliable indicium of what Congress intended to preempt. Pet. App. 21a.

Petitioners also contend that a general savings clause does not save common law claims which are inconsistent with the act. The cases cited in support of this proposition are *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987); *Chicago & N.W. Transp. Co. v. Kalo Brick and Tile Co.,* 450 U.S. 311 (1981); *Pennsylvania R.R. v. Puritan Coal Mining Co.,* 237 U.S. 121 (1915); and *Texas and Pac. Ry. v. Abilene Colton Oil Co.,* 204 U.S. 426 (1907). Those cases are distinguishable from this case. For example, *Ouellette* involved the 1972 amendment to the Clean Water Act by which the Court found that Congress intended to "establish an all-encompassing program of water pollution regulation" and that "congressional views on the comprehensive nature of the legislation were practically universal." 479 U.S. at 492. The cases of *Kalo Brick, Puritan Coal,* and *Abilene Oil* all concerned the Interstate Commerce Act, "among the most pervasive and comprehensive of federal regulatory schemes." *Kalo Brick,* 450 U.S. at 318. The savings clauses in those acts were assigned the function of precluding "field" preemption, *Ouellette,* 479 U.S. at 492; *Kalo Brick,* 450 U.S. at 328; such a function would render the savings clause of the Safety Act superfluous, since the preemption clause in the Safety Act already precludes "field" preemption. Finally, these decisions were based on the fact that the common law claims were in direct, irreconcilable conflict with other provisions of the respective statutes.[7] In the present case, Petitioners

[7] Also important to the conclusion of preemption despite a savings clause in those cases was the fact that the aggrieved party [footnote continued]

do not cite to any provisions of the Safety Act which are directly and irreconcilably in conflict with Respondents' claims. The preemption clause in the Safety Act is silent as to common law claims.

To accept Petitioners' argument, the court must conclude that Congress intended the term "motor vehicle safety standard" to include common law claims. Such a conclusion does violence to the plain language of the Safety Act. The preemption provisions does not refer to common law or even "state law;" it mentions only action by a "State or political subdivision of a State." Clearly, Congress was restricting the ability of state legislative bodies to enact safety standards different from the federal standards, by seeking to obtain uniformity of government-imposed, mandatory regulations.[8] The term "standard," as it is used throughout the Safety Act, refers to positive enactments by legislatures and agencies. The phrases "safety standard" and "motor vehicle safety standard" are used interchangeably throughout the Safety Act. The Safety Act's express preemption clause provides:

had other remedies available. *Ouellette,* 479 U.S. at 497 (could bring a nuisance claim pursuant to law of source state); *Kalo Brick,* 450 U.S. at 331 (aggrieved shipper could pursue avenues of relief set forth in the statute).

If the claims in the present case are preempted, Respondents are left without a remedy. *See Silkwood v. Kerr-McGee,* 464 U.S. 238, 251 (1984) (It is "difficult to believe that Congress would remove all means of judicial recourse for injuries negligently caused by a manufacturer without comment or express language").

[8] Compare 29 U.S.C. §1144(c)(1), part of ERISA, where the "state law" which is preempted includes "all laws, decisions, rules, regulation, or other state action having the effect of law." This is the kind of language Congress uses when it intends to preempt common law claims, and it is provisions like this with which a general savings clause would be in conflict.

> Whenever a Federal motor vehicle *safety standard* established under this title is in effect, no State or political subdivision of a State shall have authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any *safety standard* applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. §1392(d) (emphasis added). The words "safety standard" mean the same thing both times those words are used in the above provision. The Act defines a safety standard as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practical, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. §1391(2). Petitioners have offered no explanation as to how a common law action establishes "a minimum standard . . . which provides objective criteria." Congress did not intend for common law actions to fall within the meaning of the term "safety standard" as used in the Safety Act's preemption clause.[9] Respondents' reading of the preemption clause is especially appropriate because of *Cipollone's* mandate that express preemption provisions be construed in light of the

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[9] Read against the backdrop of nonuniform state regulations which existed in the early to mid-1960s when the Act was passed, the term "safety standard" most naturally refers to positive enactments by state legislators and rule-making bodies, not to common law damages actions.

Note, *Automobile Passive Restraint Claims Post Cipollone: An End to the Federal Preemption Defense.* 46 Baylor L.Rev. 141, 177 (1944). *See also* p. 177 n.219 (providing numerous examples of Safety Act provisions employing the term "standard").

presumption against the preemption of state police power. 112 S.Ct. at 2618-19, 2625-26. *See also Easterwood,* 113 S.Ct. at 1737 ("In the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption").

The fact that the preemption clause was not intended to preempt common law claims, and that the savings clause was meant to preserve such claims is further supported by the legislative history of the Safety Act. For example, the Senate's version of the proposed Safety Act did not contain Section 1397(k) [formerly §1397(c)], but did contain section 1392(d). Despite that fact, the Senate Committee Report made it clear that compliance with federal standards would not preempt common law claims. It stated:

> The federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law.

S.Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966). This was not sufficient for the House of Representatives, so it added Section 1397(c). Moreover, if the plain wording of that section leaves any doubts as to Congress' intent to preserve all common law claims, those doubts are surely resolved by the House Committee Report:

> *Common law liability*. – Section 108(c) of the reported bill [15 U.S.C. §1397(c)] provides that compliance with any federal motor vehicle safety standard does not exempt a person from any liability under common law.

> *It is intended,* and this subsection specifically establishes, *that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law* particularly those relating to *warranty,* contract, *and tort liability.*

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added.) The reason for the House of Representatives to add Section 1397(c), may be found in the Congressional testimony of Tom Tripleett of Chester, South Carolina:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded.

Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, ("Safety Act Hearings"), 89th Cong., 2d Sess. Part 2, 1249 (1966).

Petitioners rely heavily on *Wood v. General Motors Corp.,* 865 F.2d 395 (1st Cir. 1988), *cert. denied,* 494 U.S. 1065 (1990), to support their argument that the present case was wrongly decided. The *Wood* court based its decision to preempt the "no airbag" claim on "the ambiguity created by section 1392(d) in combination with the savings clause, *combined with the paucity of design defect suits at the time the Safety Act was passed. Wood,* 865 F.2d at 416. The incorrect premise that Congress did not know about design defect claims in 1966, led the *Wood* court to conclude that Congress could not have intended for federal standards and "state design standards" to coexist. *Id.* at 403. By 1966, strict liability for design defects had made its way into the law. *See* 46 Baylor L.Rev. 141, *supra.* n.9, at 178 n.223 (listing pre-1966 sources which discuss strict liability for design defects). This flaw in the *Wood* court's analysis was recognized by the Eleventh Circuit in its express preemption analysis of *Taylor.* The *Taylor* court rejected the argument as unpersuasive. 875 F.2d at 825 ("[the doctrine established by *Larson*] did not emerge *ex nihilo*").

The Court of Appeals correctly interpreted and applied *Cipollone's* mandate to the present case and arrived at a decision consistent with the language and legislative history of the Safety Act. *Cipollone* and the present case have each followed reasoning which is the bedrock of federalism. There is no basis for further review by this Court.

C. Respondents' Common Law Claims Do Not Conflict With the Safety Act Nor With Standard 121

In their argument on "conflict" preemption, Petitioners argue that the Eleventh Circuit's reading of *Cipollone* is flawed. First, Petitioners contend that by relying on the first part of *Taylor* (Pet. App. 10a), the Eleventh Circuit necessarily decided that the brake claims herein are similar to "no airbag" claims, and that both are inconsistent with federal law under the Safety Act. This is

simply not accurate. The court simply reaffirmed its prior holding in *Taylor* that "the Safety Act does not expressly preempt common law liability for a safety defect that is addressed by a safety standard established under the Safety Act." Pet. App. 10a. This language does not show that the court recognized a conflict; instead, the court thereby recognized that Congress intended to limit positive regulatory enactments by states, but to allow federal regulation and state common law to coexist. *See* Pet. App. 22a ("For example, *a state legislative enactment* requiring action forbidden by a safety standard clearly would be preempted") (emphasis added). This conclusion has also been reached by other courts. *See, e.g., Larson,* 391 F.2d at 506 ("It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability"); *Gingold v. Audi-NSU-Auto Union,* 567 A.2d 312, 328-30 (Pa. Super. Ct. 1989) (finding state tort damage awards are consistent with and further the Act's principle purpose); *Perry,* 957 F.2d at 1265-66 ("Congress sought to meet its goal of minimizing the number of deaths and injuries caused by auto accidents by setting forth minimum standards and leaving common law liability in place").

Next, Petitioners cite *Gade v. National Solid Wastes Management Ass'n,* 112 S.Ct. 2374 (1992), and *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 114 S.Ct. 517 (1993), arguing that both before and after its *Cipollone* decision, the Court reaffirmed the applicability of "conflict" preemption analysis under a statute containing an explicit preemption provision and a broad savings clause. Neither of these cases involved a common law claim.

The *Gade* case concerned a declaratory judgment action seeking to enjoin the Illinois EPA from enforcing Illinois licensing acts for workers who handle hazardous waste on the basis that the acts were preempted by the OSH Act and OSHA regulations. 112 S.Ct. at 2381. Furthermore, the statute at issue did not involve a true express preemption clause. The plurality found that §18(a) of the act was a savings clause, not a preemption clause. Preemptive effect had to be implied from what the clause did not save. *Id.* at 2384. The Court, rejecting Justice Kennedy's finding that preemption is express, stated, "We cannot agree that the negative implications of the text . . . *expressly* address the issue of federal preemption of state law. We therefore prefer to place this case in the category of implied preemption." *Id.* at 2386 n.2 (emphasis in original).

The *John Hancock* case involved a suit brought pursuant to a *federal* statute, ERISA, by the trustee of a corporation's retirement plan to enforce ERISA's fiduciary standards against the administrator of the fund. 114 S.Ct. at 523. However, the state regulation in question was in direct, irreconcilable conflict with the ERISA provision which required fiduciaries to act solely in the interest of the participants and beneficiaries, so the savings clause could not save it. *Id.* at 525. Once again, Petitioners have not indicated any provisions of the Safety Act that irreconcilably conflict with Respondents' claims. There certainly is no provision which states that the ability of a manufacturer to choose any option under a federal motor vehicle safety standard shall not be curtailed by the common law, a provision Congress could have included if that were its intent. *See Gingold,* 567 A.2d at 325.

Conflict analysis is only appropriate where the state requires something that the federal government prohibits, or vice versa. The Safety Act does not prohibit common law claims. Congress' intent with regard to state common law actions is expressly stated in the language of the Safety Act. The preemption clause and the savings clause together provide "a reliable indicium of congressional intent with respect to state authority." Those provisions provide a scheme by which Congress intended federal regulation to coexist with common law to serve the ultimate goal of motor vehicle safety. Thus, Respondents' claims promote the Safety Act's ultimte goal of vehicle safety. Uniformity, which Petitioners contend to be compromised by the common law claims, is, at most, a subsidiary goal of the Safety Act – not one to be exalted over conumer protection. See *Welsh v. Century Products,* 745 F.Supp. 313, 318-19 (D.Md. 1990) ("the structure of the Safety Act and its legislative history disclose no independent purpose to achieve nationwide authority in regulation at the expense of common law causes of action . . . Uniformity in regulation is a goal of the Safety Act only insofar as it promotes safety. Uniformity is not a goal in and of itself; nor is uniformity a goal . . . so that vehicle equipment manufacturers might avoid tort liability"). *See also Buzzard,* 966 F.2d at 782-84.

Petitioners argue that the common law claims frustrate federal law because individual juries will be allowed to apply vehicle design standards that state legislatures or agencies could not. This has traditionally been Congress' approach in the area of consumer protection. *See, e.g., Abbott v. American Cyanamid Co.,* 844 F.2d 1108 (4th Cir. 1988) (Food, Drug and Cosmetic Act did not preempt common law claims); *Ferebee v. Chevron Chem-*

ical Co., 736 F.2d 1529, 1539-43 (D.C. Cir. 1984) (Federal Insecticide, Fungicide nd Rodenticide Act does not preempt common laws tort suits); *Hubbard-Hall Chemical Co. v. Siverman,* 340 F.2d 402 (1st Cir. 1965) (same as *Ferebee*); *Raymond v. Riegal Textile Corporation,* 484 F.2d 1025 (1st Cir. 1973) (Flammable Fabrics Act does not preempt common law claims); *see also* 29 U.S.C. §2074 (Consumer Product Safety Act does not preempt common law liability); *Cipollone,* 112 S.Ct. at 2628 n.2 (opinion of Blackmun, J.); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984).

Petitioners "conflict" preemption argument urges "[a] freewheeling judicial inquiry into whether a state [claim] is in tension with federal objectives [which] undercut[s] the principle that it is Congress rather than the courts that preempts state law." *Gade,* 112 S.Ct. at 2390 (Kennedy, J., concurring). If a court claims to be analyzing congressional intent, but simply considers the general purpose of the federal statute instead of addressing the specific intent of Congress to displace the states, such reasoning is in conflict with the reservation of police powers to the states. Congressional "intent" in such cases is analyzed as if the states did not exist, and the state law is then placed in opposition to that intent. Petitioners are actually arguing that conflict preemption should apply regardless of what Congress intended and expressly stated. However, the Supremacy Clause, by its own terms, operates not in spite of, but through congressional enactments. Petitioners' reasoning ignores the presumption that state common law is not to be superseded unless Congress clearly intends it to be. Such reasoning presupposes that a conflict arises whenever state law and federal law deal with substantially similar subject matter. On the contrary, "[t]here is no general inherent conflict between federal preemption of

state [motor vehicle safety standards] and the continued vitality of state common law damage actions." *Cipollone,* 112 S.Ct. at 2618.

In the present case, the Eleventh Circuit's decision does not deal directly with the "conflict" preemption argument, apparently on the basis that *Cipollone* foreclosed conflict analysis.[10] However, the court did deal with that issue in another preemption case. In *Lake Aircraft,* plaintiff contended that his airplane passenger seat lacked a proper "energy attenuating" mechanicsm to absorb crash forces. 992 F.2d at 292. The court examined the relevant federal regulations and determined that "although federal regulations recognized energy absorbing features as design options, no provision required that aircraft seats contain an energy absorbing device to be certified as 'airworthy.' " *Id.* at 294. Following *Cipollone,* the court held that Congress did not intend to preempt plaintiff's claims. *Id.* at 295. The court then addressed the issue of "conflict" preemption and determined that the case presented no actual conflict. The court found that there is no actual state/federal conflict where federal design regulations permit but do not require manufacturers to use certain designs. 992 F.2d at 295 n.5.

There is no difference between the claims in *Lake Aircraft* and the claims in the present case. Standard 121 did not require but did permit manufacturers to use antilock brakes.[11] An airbrake system with antilock

[10] However the "conflict" preemption argument was Petitioners' main contention on petition for rehearing and suggestion for rehearing *en banc* which were summarily denied. Pet. App. 49a.

[11] Respondents' claims do not involve a choice between antilock brakes or airbrakes as stated in Judge Hill's dissent. Slip op. [footnote continued]

devices (permitted by Standard 121) is a safer braking system than the one required by the minimum standards of the Safety Act, just as a seat with proper energy absorbing features (permitted under the federal aviation standards) is a safer seat than the one required by the minimum standards of the FAA.

Regardless of whether a "more robust view of the scope of 'express preemption' " is applied to this case, the language, legislative history, statutory context, and purpose of the Safety Act demonstrate that Respondents' claims are not preempted. There is no basis for further review.

at 1189. Antilock systems are part of a service brake system that automatically controls wheel slip during braking. Air brake systems relate to transmitting pressure from the driver's brake to the service brake. *See* 49 C.F.R. §571.121 S4. Definitions. Plaintiffs' claims have no effect on the air brake requirements; defendants should have installed antilock brakes in addition to meeting the air brake requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
SEP 22 1994
OFFICE OF THE CLERK

(5)

No. 94-286

IN THE
Supreme Court of the United States
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents do not dispute the clear present conflict between the Eleventh Circuit decision in this case and the decisions of at least the First, Third, and Tenth Circuits (as well as of various state courts) on the issue presented. *See* Br. in Opp. 12. Nor do they dispute the importance of this obviously recurring issue; indeed, their discussion of a host of recent cases confirms its importance. Br. in Opp. 14 & n.5. Respondents nevertheless suggest that this Court should deny certiorari based on the speculation that the circuit conflict will disappear on its own, as the First, Third, and Tenth Circuits (together with several state courts) *all* will repudiate their precedents on the

issue in light of a passage in this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). Br. in Opp. 12-14. As the petition explains, however, and as respondents' own brief confirms, this speculation is so implausible that it offers no sound reason to decline review. And respondents' effort to defend the Eleventh Circuit's decision reinforces, rather than undermines, the argument for granting the petition.

1. Specifically, even if other circuits were to agree with the Eleventh Circuit that *Cipollone* announced a radical new preemption principle—excluding implied preemption in the face of certain express preemption provisions—that conclusion could not logically furnish a basis for abandonment of the express conclusion (in *Wood*, followed by *Kitts*) that any such principle of preemption law would not apply to the Safety Act.[1] By the same token, even if other circuits (and state courts) were to follow the Eleventh Circuit's lead in training their focus exclusively on the savings clause of the Safety Act, nothing in *Cipollone*, which involved no savings clause, could conceivably provide a ground for repudiating the explicit rulings of the First, Third, and Tenth Circuits that the savings clause does *not* preserve "common law actions that would subvert a federal statutory or regulatory scheme"[2]—a conclusion, directly contrary to the Eleventh Circuit's conclusion here, affirmed by decisions of this Court both before and after *Cipollone*. *See* Pet. 17-19. Thus, respondents' prediction that numerous other courts all would take the extraordinary step of overruling their precedents suffers from crucial logical flaws *even if* all of those courts were to adopt the Eleventh Circuit's reading of *Cipollone*.

---

[1] *Wood v. General Motors Corp.*, 865 F.2d 395, 414 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

[2] *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1125 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990).

If respondents' logic fails to support their prediction of widespread overruling based on *Cipollone*, post-*Cipollone* experience affirmatively undermines the prediction. The evidence, not disputed by respondents, is that a number of federal district courts and state appellate courts have found preemption under the Safety Act since *Cipollone*. *See* Pet. 17; Br. in Opp. 13-14. Thus, respondents' prediction, which starts off as mere speculation, not only is unsupported by their reasoning; the evidence is positively against it.

2. Respondents' actual discussion of *Cipollone* and the substance of the Eleventh Circuit's reasoning does the very opposite of bolstering their prediction of widespread overruling of precedents. To the contrary, the discussion strongly confirms how forlorn and implausible is their hope that numerous other courts will all reverse course and come into line with the Eleventh Circuit's ruling here. In several ways, respondents' discussion powerfully reinforces the need for this Court's review.

First, respondents insist that "the court of appeals' decision is based on the *Cipollone* rule that the existence of express preemption provisions precludes implied preemption." Br. in Opp. 12; *see id.* at 9 (Eleventh Circuit held that *Cipollone* directs "that the existence of an express preemption provision precludes implied preemption analysis"). But that reading of *Cipollone* has already been squarely rejected by the D.C. Circuit—in a decision completely ignored by respondents. *Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 581 n.12 (D.C. Cir. 1994) ("We do not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses altogether the possibility that state statutes in actual conflict can be preempted. . . . Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a 'reliable indicium of congressional intent with respect to state authority.'"

(quoting *Cipollone*)). The circuit conflict thus goes beyond even the First, Third, and Tenth Circuits.

Second, respondents specifically defend the Eleventh Circuit's analysis of the Safety Act based on the conclusion that "[t]he preemption clause in the Safety Act is silent as to common law claims" because the clause uses the phrase "safety standard." Br. in Opp. 17-18. But that conclusion is so patently erroneous under this Court's decisions in *Cipollone* itself as well as *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (199?), that it could not possibly be the basis for a turnaround by other circuits on the Safety Act. *See* Pet. 10 & n.3. And this conclusion, like the reading of *Cipollone* underlying the Eleventh Circuit's decision, is also flatly inconsistent with the clear law in many other circuits. *See* Pet. 16 n.4 (citing cases); Brief *Amicus Curiae* for American Trucking Ass'ns at 12-14 (citing cases). Again, the circuit conflicts presented by this case are wider even than the ones respondents concede.

Third, and perhaps most revealingly, even respondents cannot bring themselves to endorse the Eleventh Circuit's reading of *Cipollone*, but are forced to acknowledge that *Cipollone* cannot sensibly be read to establish unqualifiedly the very proposition on which the Eleventh Circuit rested its decision. Recognizing that the Eleventh Circuit's preemption principle is vulnerable to this Court's longstanding line of precedent applying conflict preemption standards even to statutes containing broad savings clauses —precedent as old as *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), and as fresh as *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993)—respondents understandably start backing away from the Eleventh Circuit's (and, initially, respondents' own) proposition that implied preemption is precluded by an express preemption provision like that contained in the Safety Act. Instead, respondents repeatedly assert that a "direct, irreconcilable conflict" may yet support a finding of pre-

emption, notwithstanding an express preemption provision that does not reach the situation. Br. in Opp. 16, 23. But that acknowledgement utterly destroys the whole legal theory on which the decision below rests—as well as any remaining basis for respondents' prediction that widespread circuit-court overturning of precedents will occur based on acceptance of the Eleventh Circuit's reading of *Cipollone*, which respondents themselves now treat as not quite defensible. In short, respondents' own substantive discussion of preemption law confirms the several reasons set forth in the petition (which we will not repeat here) for rejecting the claim that *Cipollone* meant to revolutionize preemption law in the way the Eleventh Circuit held.

3. Respondents also cannot defend the Eleventh Circuit ruling by suggesting that there is no "conflict" between federal and state law in this case. *See* Br. in Opp. 21-27. The Eleventh Circuit, of course, readily acknowledged that a conflict exists here (for Standard 121) in precisely the same way as a conflict existed in the First, Third, and Tenth Circuit cases finding preemption (for Standard 208): "in both cases a safety standard established under the [Safety] Act effectively gave the manufacturers the option of not installing the device" that plaintiffs asked state common law to require (Pet. App. 10a). It was precisely because the Eleventh Circuit acknowledged this conflict, in the ordinary "conflict preemption" sense, that it found it necessary to overturn its prior precedent in order to reject preemption.

Similarly, respondents are simply wrong when they say that the *Paccar* decision, which forced NHTSA to create the Standard 121 option for trucks, "was not based on a finding that the antilock requirement was unsafe." Br. in Opp. 6 (discussing *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978)). As the petition shows (Pet. 7), the *Paccar* court required the revision precisely because of "a potentially more hazardous highway situation" with the requirement

than without; it was thus explicitly the "possibility of greater danger to the public" that caused the adoption of the Standard 121 option (as with the air bags option contained in Standard 208). *Paccar,* 573 F.2d at 643. Respondents' statement to the contrary is incomprehensible.

With this misstatement of *Paccar* and the impact of Standard 121 out of the way, it is obvious why the various decisions respondents urge upon this Court (Br. in Opp. 11-12) are inapposite here. Those decisions decline to find preemption based on mere compliance with those federal safety standards that set only minimum requirements. Standard 121, however, like the Standard 208 at issue in the First, Third, and Tenth Circuit cases repudiated by the Eleventh Circuit here, does *not* just set minimum standards, but grants an option to truck manufacturers for reasons of safety and practicability, as the Eleventh Circuit recognized (Pet. App. 10a). This Court should resolve the clear conflict over whether federal law preempts state common-law determinations that take away the federally granted option.

CONCLUSION

For those reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 22, 1994

No. 94-286

(2)

Supreme Court, U.S.
FILED
SEP 16 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE SUPPORTING THE PETITION

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31 pp

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---

MOTION OF AMERICAN TRUCKING ASSOCIATIONS, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, American Trucking Associations, Inc. (ATA) respectfully moves for leave to file the accompanying brief as *amicus*

curiae in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of the brief; however, counsel for respondents has declined consent.

ATA is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of for-hire carriers, private carriers, leasing companies, and trucking suppliers. ATA regularly advocates the trucking industry's interests before this Court and other courts.

ATA's members have a strong interest in motor vehicle and — in particular — truck safety issues. The Federal Motor Vehicle Safety Standard at issue in this case, 49 C.F.R. § 571.121 (FMVSS 121), grants an option whether to install antilock braking devices on trucks and trailers. The court of appeals nonetheless held that FMVSS 121 does not preempt inconsistent state common law standards and that lay juries are at liberty to second-guess the policy judgment of an expert federal administrative agency on the complex issue whether trucks must have antilock brakes. That holding has substantial significance to ATA's members, who put thousands of trucks on the road every day of the year.

Moreover, the court of appeals adopted an unprecedented and plainly erroneous interpretation of this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), that conflicts with numerous decisions by other federal and state courts. If not reversed, the court's ruling will have a profound and deleterious effect not only on federal motor vehicle safety standards but in all cases in which a federal preemption defense is properly advanced by those (such as ATA's members) who must comply with uniform federal safety standards.

ATA seeks to inform the Court of the importance of the issues raised by the petition, particularly as they affect the trucking industry, and the potential adverse consequences of leaving those issues unreviewed.

For the foregoing reasons, the motion of ATA to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-286

FREIGHTLINER CORPORATION,
Petitioner,

v.

BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,

v.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

Respondents brought tort actions under Georgia law seeking damages from petitioners based solely on the fact that petitioners' trucks, which were involved in accidents affecting respondents, did not have antilock brakes. Petitioners raised a federal law preemption defense, citing their compliance with the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169) (Safety Act),[1] and Federal Motor Vehicle Safety Standard (FMVSS) 121, 49 C.F.R. § 571.121, promulgated by the National Highway Traffic Safety Administration (NHTSA) under the Safety Act, which grants an option to install antilock brakes on trucks and trailers. In fact, FMVSS 121 was specifically amended by NHTSA to make antilock brakes optional, see 44 Fed. Reg. 46,849 (1979), because, as the Ninth Circuit found in *Paccar, Inc.* v. *National Highway Traffic Safety Admin.*, 573 F.2d 632, 640 (9th Cir.), cert. denied, 439 U.S. 862 (1978), "unforeseen problems in the development of the new braking systems" made a standard mandating antilock brakes "neither reasonable nor practicable" and "created a potentially * * * hazardous highway situation" (*id.* at 643). Nonetheless, the Eleventh Circuit rejected petitioners' preemption defense.

Without a hint of its drastic consequences, the court of appeals' decision would — if left undisturbed by this Court — revolutionize federal preemption law. Over a vigorous dissent, the panel majority concluded that this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), mandated "that when there is an express pre-emption provision [in a federal statute] we should not consider implied pre-emption" (Pet. App. 11a), even if there is an actual conflict between federal and state law. Under this reading of

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[1] For ease of reference, we (as do petitioners) cite to the prior codification, which was cited by the courts below.

Cipollone, conduct *required* by federal law may be *prohibited* by state law.

No decision by this Court has ever adopted or even remotely suggested this astounding result in the face of the Supremacy Clause of the Constitution. U.S. Const. art. VI. Indeed, the Eleventh Circuit's ruling is flatly inconsistent with this Court's precedents both before and after *Cipollone* and creates a sharp conflict with numerous federal and state court decisions. Review by this Court is essential.

ARGUMENT

I. THE ELEVENTH CIRCUIT MISAPPLIED THIS COURT'S PRECEDENTS AND CREATED A SQUARE CONFLICT AMONG THE LOWER COURTS ON THE IMPORTANT QUESTION WHETHER THE SAFETY ACT IMPLIEDLY PREEMPTS INCONSISTENT COMMON LAW TORT CLAIMS

Joining all of the other circuits that had addressed the issue,[2] the Eleventh Circuit held in *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (1989), cert. denied, 494 U.S. 1065 (1990), that common law claims based on an automobile manufacturer's failure to install airbags were impliedly preempted under the Safety Act and FMVSS 208, 49 C.F.R.

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[2] See *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 493 U.S. 804 (1989); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). A number of state appellate courts had reached the same result. See, *e.g.*, *Nissan Motor Corp.* v. *Superior Court*, 261 Cal. Rptr. 80 (Cal. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Gardner* v. *Honda Motor Co.*, 536 N.Y.S. 2d 303 (App. Div. 1988), app. dismissed, 543 N.Y.S.2d 401 (1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 497 U.S. 1236 (1988).

§ 571.208, because state tort law would conflict with and frustrate the purposes of the federal regulatory scheme. 875 F.2d at 825-827. Relying on numerous preemption decisions of this Court, the Eleventh Circuit in *Taylor* concluded that "a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option." *Id.* at 827.

The same result should have obtained in this case because FMVSS 121, like FMVSS 208, grants a federal safety option. In *Taylor*, the option was a choice under FMVSS 208 between seat belts and airbags; here it is a choice under FMVSS 121 whether to install antilock brakes. Here, as in *Taylor*, plaintiffs' claims are impliedly preempted because they conflict with federal law by seeking damages from defendants for exercising an FMVSS option.

The Eleventh Circuit, however, refused to follow its own precedents and the unbroken chain of rulings from other circuits finding implied preemption under the Safety Act. Instead, the court of appeals charted a new course in federal preemption law by holding that it was powerless to engage in any implied preemption analysis. This remarkable conclusion was based upon a plain misreading of this Court's decision in *Cipollone*.

A. *Cipollone* Did Not Radically Transform Preemption Law.

The Eleventh Circuit held that it was obliged to reconsider its holding in *Taylor* in light of a single sentence in *Cipollone* stating that if a federal statute has an express preemption clause and if "that provision provides a 'reliable indicium of congressional intent with respect to state authority,' * * * 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." 112 S. Ct. at 2618. The court of appeals broadly interpreted this one sentence to mean that the implied preemption doctrine is no longer applicable to statutes with

express preemption clauses. Because the Safety Act has such a clause, 15 U.S.C. § 1392(d), the majority abandoned *Taylor*'s implied preemption analysis (Pet. App. 11a).

1. This holding is flatly inconsistent with this Court's precedents. As a threshold matter, it is implausible that in one sentence the *Cipollone* Court intended to repudiate a long line of preemption decisions permitting (indeed, accepting) implied preemption arguments regarding statutes with express preemption clauses. See, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139-140 (1990); *Northwest Cent. Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509-522 (1989); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-543 (1977).[3] This reading of *Cipollone* is especially improbable given the complete absence of any suggestion that this Court was embarking on such a radical course. See, *e.g.*, *Lee* v. *Weisman*, 112 S. Ct. 2649, 2655 (1992).

Furthermore, the Eleventh Circuit's interpretation is contrary to this Court's decisions rendered before and after *Cipollone*. In *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992), for example, the plurality held that a state law was impliedly preempted despite an express preemption clause in the federal statute. The court of appeals dismissed *Gade* as a mere plurality opinion (Pet. App. 14a). The significance of *Gade*, however, is that the opinion was

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[3] The court of appeals' interpretation of *Cipollone* is also at odds with the proposition that state laws conflicting with federal law are preempted "by direct operation of the Supremacy Clause," *i.e.*, without regard to whether the federal statute or regulation contains a preemption clause. *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). As Justice Souter observed last Term, "whether or not Congress has used any special 'preemptive' language, state regulation must yield to the extent it actually conflicts with federal law." *BFP* v. *Resolution Trust Corp.*, 114 S. Ct. 1757, 1776 (1994) (Souter, J., dissenting, joined by Blackmun, Stevens, and Ginsburg, JJ.)

joined by three Justices (the Chief Justice and Justices O'Connor and White) who would — six days later — join the sentence in *Cipollone* that the court below interpreted to bar implied preemption in the face of an express preemption clause. This is strong evidence that the Eleventh Circuit's reading of *Cipollone* cannot possibly be correct.

Indeed, after *Cipollone*, this Court decided *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732 (1993), which considered whether state tort claims regarding a warning device at a railroad crossing were preempted by the Federal Railroad Safety Act (FRSA). The FRSA has an express preemption clause that bars any state law requirement that relates to railroad safety when there is a federal "rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. Because the Court concluded that the federal regulations at issue did not "cover" the same subject matter as the tort claims, it held that those claims were not expressly preempted. 113 S. Ct. at 1742. The Court then proceeded to "reject" the "claim of implied 'conflict' preemption, * * * on the basis of the preceding analysis" (*id.* at 1742 n.12).

The Eleventh Circuit read *Easterwood* as precluding a "separate implied pre-emption analysis" if there is an express preemption clause in a statute (Pet. App. 17a). However, as Judge Hill noted in his dissent, the more persuasive interpretation is that the Court "did not conduct an implied conflict pre-emption analysis because, 'on the basis of the preceding analysis,' it found no conflict between the federal regulations and the common law negligence claim" (Pet. App. 30a). Thus, this Court rejected implied preemption *on the merits*, not because it was inappropriate to consider the contention.

In fact, the *Easterwood* Court stated that an express preemption clause is *not* dispositive: "If the statute contains an express pre-emption clause, the task of statutory

construction must *in the first instance* focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 113 S. Ct. at 1737 (emphasis added). In this case, by contrast, the court of appeals held that an express preemption clause is not the first but the *only* evidence ("the alpha and omega" (Pet. App. 18a)) of Congress' preemptive intent.

2. A careful reading of *Cipollone* and *Easterwood* reveals that implied preemption has *not* been abolished in *all* cases involving a federal statute with an express preemption clause. Instead, *Cipollone* holds only that because congressional intent is the touchstone of preemption analysis, implied preemption arguments might be barred where a statute's express preemption clause "provides a 'reliable indicium of congressional intent with respect to state authority.'" 112 S. Ct. at 2617, 2618 (citation omitted).[4]

For at least two reasons that were rejected without serious analysis by the court of appeals, the Safety Act's

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[4] The Eleventh Circuit cavalierly brushed aside the "reliable indicium" requirement of *Cipollone*, finding it "not much of a hurdle" (Pet. App. 18a). Although the court recognized that this requirement was a "condition" of this Court's analysis (*ibid.*), it converted this condition into a "presumption" (*id.* at 19a) — with no precedent or rationale to support it — that a preemption clause, in and of itself, is always a reliable indicium of congressional intent to eliminate implied preemption. This presumption, in the court of appeals' view, is virtually conclusive: a preemption clause is "the alpha and omega" of the inquiry on congressional intent (*id.* at 18a).

If anything, the presumption should operate in the opposite direction. Absent compelling evidence to the contrary, it should be presumed that Congress did *not* intend to eliminate the implied preemption doctrine. After all, why would Congress want to authorize state action that conflicts with or frustrates the purposes of federal law?

preemption clause does not provide a reliable indication of congressional intent to preclude implied preemption of state laws that conflict with the federal scheme embodied in the Act. First, 15 U.S.C. 1392(d) does not purport to be an exhaustive description of the state authority that Congress meant to displace. Notably, this case involves preemption by federal regulation. Where the source of preemptive federal action is an administrative agency rather than Congress itself, it is unreasonable to expect a statutory express preemption provision to define the full scope of preemption required to ensure the supremacy of federal law. This is especially true here because the safety regulations were issued under a broad delegation of congressional power. See 15 U.S.C. §§ 1381, 1392(a), 1407.

Second, the Safety Act's preemption section does not provide a "reliable indicium" of Congress' preemptive intent because it does not reflect all of the available evidence of Congress' thinking. The savings clause included in Section 1397(k) — compliance with a safety standard "does not exempt any person from liability under common law" — shows that Congress expected implied preemption to operate under the Safety Act. The savings clause was added to prevent implied *field* preemption from entirely displacing state law (see pp. 15-16, *infra*), but Congress did not save state law claims from implied *conflict* preemption. Indeed, there would have been no need to adopt a savings clause at all if the mere existence of an express preemption clause foreclosed any implied preemption inquiry. Moreover, no presumption against preemption is applicable in deciding whether state law conflicts with federal law. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988).

A recent amendment to the Safety Act, not discussed by the court of appeals, provides further evidence that the court's conclusion on congressional intent is wrong. In reauthorizing the Safety Act in 1991, Congress explicitly ratified implied preemption in directing NHTSA to amend FMVSS 208 to

require airbags in all new motor vehicles. Congress recognized that several courts had held that tort suits based on the failure to install airbags were impliedly preempted and that the "all airbag" amendment might be construed as disturbing those precedents. See Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086 (1991); H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. The 1991 amendment therefore specified that it

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Section 2508(d), 105 Stat. 2086. The conference report, citing the prior decisions on implied preemption, explained that Congress "do[es] not want by this section to change the law on liability as it existed prior to enactment" (*i.e.*, late November 1991). H.R. Conf. Rep. No. 404, *reprinted in* 1991 U.S.C.C.A.N. at 1783. This legislation and its history show conclusively that — contrary to the Eleventh Circuit's holding — the Safety Act's express preemption provision does not reliably indicate Congress' intent to preclude implied preemption analysis.

B. The Court Of Appeals' Decision Conflicts With Numerous Federal And State Precedents.

1. As noted above, the Eleventh Circuit's decision in this case conflicts directly with decisions by the First, Third, and Tenth Circuits finding implied preemption of common law tort claims by the Safety Act. See *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 493 U.S. 804 (1989); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). Moreover, a

number of courts have considered this issue since *Cipollone* was decided and have, unlike the Eleventh Circuit, found implied preemption under the Safety Act. See, *e.g.*, *Boyle* v. *Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs* v. *Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Gills* v. *Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993).

The conflict between the lower courts on this important issue is real and will not dissipate. Just weeks ago, the Eleventh Circuit in *Hunnings* v. *Texaco, Inc.*, 1994 WL 424296, *7 (Aug. 12, 1994), reaffirmed its holding in this case and "decline[d] the defendants' invitation to conduct an implied preemption analysis" simply because the federal statutes at issue (the Federal Hazardous Substances Act, 15 U.S.C. § 1261, *et seq.*, and the Poison Prevention Packaging Act of 1970, 15 U.S.C. § 1471, *et seq.*) had express preemption provisions. *Ibid.* (citing *Myrick* v. *Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994)). The D.C. Circuit, on the other hand, recently stated in *Jackson* v. *Culinary School of Washington, Ltd.*, 27 F.3d 573, 580 n.12 (1994) that it does

> not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses altogether the possibility that state statutes in actual conflict can be preempted. The overriding focus of preemption analysis is on the intent of Congress. See *CSX* v. *Easterwood*, 113 S. Ct. 1732, 1737 (1993); *Cipollone*, 112 S. Ct. at 2617. Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a "reliable indicium of congressional intent with respect to state authority." *Cipollone*, 112 S. Ct. at 2618.

Thus, unlike the Eleventh Circuit, the D.C. Circuit does not read *Cipollone* to preclude an implied preemption analysis just

because the federal statute at issue has an express preemption provision.

2. The Eleventh Circuit sought to minimize the significance of its holding (which is, in fact, revolutionary) by asserting that "at least eight of our sister circuits have reached the same conclusion about the meaning of the *Cipollone* decision." Pet. App. 11a. That statement is simply incorrect. None of the cases cited held that an express preemption clause precludes consideration of implied preemption where — as in this case — there is an actual conflict between federal and state law. In most of the cases cited by the Eleventh Circuit, the courts found express preemption.[5] Accordingly, those courts had no occasion to decide whether implied preemption bars a state law that is beyond the scope of an express preemption clause but conflicts directly with federal law.

In three of the cases cited by the court of appeals, there was no conflict between state and federal law,[6] and in one of them the Second Circuit stated that "a finding of implied preemption * * * is not *automatically* foreclosed by the existence of a preemption clause." *Toy Mfrs. of Am., Inc.* v. *Blumenthal*, 986 F.2d 615, 623 (2d Cir. 1993) (emphasis in original). Thus, there is no support in the other circuits for

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[5] *Worm* v. *American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Kinley Corp.* v. *Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993); *Weber* v. *Heaney*, 995 F.2d 872 (8th Cir. 1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993); *Greenwood Trust Co.* v. *Commonwealth of Massachusetts*, 971 F.2d 818 (1st Cir. 1992), cert. denied, 113 S. Ct. 974 (1993).

[6] *Draper* v. *Chiapuzio*, 9 F.3d 1391 (9th Cir. 1993); *Toy Mfrs. of Am., Inc.* v. *Blumenthal*, 986 F.2d 615 (2d Cir. 1993); *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir.), cert. denied, 114 S. Ct. 291 (1993).

the new trail in federal preemption law blazed by the Eleventh Circuit.

II. THE ELEVENTH CIRCUIT MISAPPLIED THIS COURT'S PRECEDENTS AND CREATED A SQUARE CONFLICT AMONG THE LOWER COURTS IN FINDING THAT THE SAFETY ACT DOES NOT EXPRESSLY PREEMPT RESPONDENTS' CLAIMS

The court of appeals' decision is flatly inconsistent with the rulings of other lower courts in yet another respect: its rejection of express preemption in light of this Court's controlling decision in *Cipollone*.

1. In rejecting express preemption (Pet. App. 7a-11a), the Eleventh Circuit applied — without questioning — its holding in *Taylor* that common law claims did not fall within the express preemption provision of the Safety Act because Congress failed to "make explicit reference to state common law in the Act's preemption clause." 875 F.2d at 824. This rationale was clearly repudiated by *Cipollone*, which held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J.). The *Cipollone* Court held that it made no difference that the preemption provision failed to "make explicit reference" to common law claims.

Since this Court's decision in *Cipollone*, seven circuits have addressed the issue of federal preemption under analogous statutes and concluded that preemption of state law "requirements" or "standards" necessarily meant that Congress intended expressly to preempt common law claims.[7] Following *Cipollone*, the overwhelming majority of

[7] See *Gile* v. *Optical Radiation Corp.*, 22 F.3d 540, 542 (3rd Cir. 1994); *Worm*, 5 F.3d at 748-49; *King* v. *E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 114 S.Ct. 490 (1993); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 114 S.Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), cert. denied, 114 S.Ct. 60 (1993); *Stamps*, 984 F.2d at 1424.

courts across the country have reached the same conclusion interpreting the scope of preemption clauses under numerous federal health and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*,[8] the Federal Hazardous Substances Act, 15 U.S.C. § 1261, *et seq.*,[9] the Medical Device Amendments of 1976

[8] See, *e.g.*, *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham* v. *Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen* v. *Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co.* v. *MSD Agvet, Div. of Merck & Co.*, 844 F.Supp. 597, 601 (D. Idaho 1994); *Quad R Farms* v. *American Cyanamid Co.*, 840 F. Supp. 694 (D. Minn. 1993); *DerGazarian* v. *Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich* v. *Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque* v. *Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper* v. *E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson* v. *Dow Chem. Co.*, 1992 WL 404681, *2 (E.D. Ky. 1992); *Brennan* v. *Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *Yowell* v. *Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *June* v. *Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993); *Hopkins* v. *Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-46 (N.C. Ct. App. 1993).

[9] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 113 S.Ct. 2999 (1993); *DeHaan* v. *Whink Prods. Co.*, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar* v. *Whink*

to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360c, *et seq.*,[10] and the Federal Boat Safety Act, 46 U.S.C. § 4301, *et seq.*[11]

The Eleventh Circuit's holding in this case that the reference in the Safety Act's preemption clause to any inconsistent state "safety standard" does *not* encompass common law standards thus conflicts with this Court's decision in *Cipollone* and the scores of federal and state court decisions post-*Cipollone* finding express preemption in similar contexts. See also *Asahi Metal Indus. Co.* v. *Superior Court*,

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Prods. Co., 1994 WL 115876, *2 (Colo. Ct. App. Apr. 7, 1994); *State ex rel. Jones Chemicals, Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994).

[10] See, *e.g.*, *Mendes* v. *Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King v. Collagen Corp.*, 983 F.2d 1130, 1135 (1st Cir.), cert. denied, 114 S.Ct. 84 (1993); *Slater* v. *Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), cert. denied, 113 S.Ct. 327 (1992); *Bravman* v. *Baxter Healthcare Corp.*, 842 F. Supp. 747, 755 (S.D.N.Y. 1994); *Griffin* v. *Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker* v. *Collagen Corp.*, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994); *Michael* v. *Shiley, Inc.*, 1994 WL 59349, *6 (E.D. Pa. Feb. 25, 1994); *Kemp* v. *Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter* v. *Zimmer, Inc.*, 830 F. Supp. 199, 203 (S.D.N.Y. 1993); *Cameron* v. *Howmedica, Div. of Pfizer Hosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker* v. *Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992); *Covey* v. *Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D. Ohio 1993).

[11] See, *e.g.*, *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (1993).

480 U.S. 102, 114-115 (1987) (referring to state common law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

2. In finding no express preemption, the Eleventh Circuit also relied (Pet. App. 7a-8a) on its prior holding in *Taylor* that the Safety Act's savings clause, 15 U.S.C. 1397(k), which provides that compliance with a FMVSS "does not exempt any person from any liability under common law," bars express preemption of common law liability. 875 F.2d at 823-825.[12] The savings clause, however, serves two functions that are narrower than the function ascribed to it by the Eleventh Circuit. The court of appeals failed to address either function — or the decisions of this Court supporting this narrow interpretation of the savings clause. See *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) ("general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision").

First, the savings clause indicates Congress' intent *not* to occupy the entire field of motor vehicle safety, so that common law claims could proceed in areas *not* covered by a safety standard. Faced with similar provisions in other statutes, this Court has interpreted them in this fashion. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981); *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 130 (1915). Contrary to the

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[12] The court of appeals also noted that the statute in *Cipollone*, unlike the Safety Act, lacked a savings clause. This cannot be dispositive, however, because this Court found express preemption of common law claims in *Easterwood*, and the FRSA has a savings clause. See 113 S. Ct. at 1736; see also *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-2040 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

Eleventh Circuit's holding, the same interpretation should apply to Section 1397(k).

Second, the savings clause also preserves common law actions that do not conflict with, or frustrate the purpose of, applicable federal safety standards, even if they may be said to relate to the "same aspect of performance." This case is an excellent example: FMVSS 121 expressly grants, for safety reasons (see p. 2, *infra*), a choice whether to install antilock braking devices and provides specifications for those devices that are installed. The savings clause would thus preserve a common law claim that an antilock braking system was negligently manufactured. On the other hand, it would not preserve a common law action, such as the claims under review here, seeking to recover damages from a defendant merely for exercising a federally granted safety option. Such a lawsuit is inconsistent with FMVSS 121 because it extinguishes a choice granted, as a matter of safety, by NHTSA. See, *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install claim from a claim that a chosen system was not properly designed, and holding that the latter claim is not preempted).

This Court has often warned that general savings clauses should not be construed in an indiscriminate fashion to allow common law actions that would subvert a federal regulatory scheme. In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a general savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*; see also *Morales*, 112 S. Ct. at 2037; *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-95 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230

(1986); *Kalo Brick*, 450 U.S. at 318; *Pennsylvania R.R.*, 237 U.S. at 129. The court of appeals in this case overlooked these precedents in its construction of the savings clause in the Safety Act.

III. REVIEW IS NECESSARY TO CORRECT THE MISAPPLICATION OF THIS COURT'S PRECEDENTS AND TO RESOLVE THE CIRCUIT CONFLICT ON AN ISSUE OF SURPASSING IMPORTANCE

Prompt review of the Eleventh Circuit's decision is essential. The court of appeals has created a sharp conflict among the circuits on an issue of exceptional national significance. Moreover, because the court's error was based on a misreading of ambiguous language in this Court's decision in *Cipollone*, only this Court can correct the error.

If the Eleventh Circuit's drastic misconstruction of *Cipollone* stands, it will mean that state law can impose duties that plainly frustrate federal objectives or even make it *impossible* to comply with federal law duties under the Safety Act or other federal statutes. This result is plainly unacceptable and contrary to the Supremacy Clause and a century of established preemption doctrine. Yet, under the court of appeals' decision, this result is *required* whenever (1) the federal statute upon which the claim of preemption is based has an express preemption clause, and (2) that clause, narrowly construed, does not encompass the state law obligation forming the basis for the plaintiff's claim. In that event, an implied preemption defense would be unavailable, even if "compliance with both federal and state regulations is a physical impossibility" or if "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wisconsin Pub. Intervenor* v. *Mortier*, 111 S. Ct. 2476, 2482 (1991) (citations and internal quotation marks omitted).

Moreover, the court of appeals' erroneous reading of *Cipollone* leads to the anomalous result that a federal statute would have greater preemptive force *without* a preemption clause than with one. For example, if the Safety Act had no express preemption clause, the Eleventh Circuit's decision in *Taylor* would have compelled application of implied conflict preemption in this case. The *inclusion* of an express preemption clause in the statute, however, caused the Eleventh Circuit to reject implied federal preemption entirely. Needless to say, courts should seek to avoid attributing such an absurd design to Congress. See *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988).

These unacceptable results flow directly from the Eleventh Circuit's plain misreading of *Cipollone* (on implied preemption) and blatant refusal to follow *Cipollone* (on express preemption). By holding that state common law claims do not fall within a federal express preemption provision unless the provision refers specifically to the common law *and* that the mere presence of an express preemption provision bars any implied preemption inquiry, the court of appeals has sanctioned a regime in which the states may wholly frustrate the purposes of a federal statutory scheme so long as they act through their common law.

Until this confusion is resolved, ATA's members cannot know whether the trucks they put on the road meet all applicable legal standards. Although the federal government decided — for safety reasons — to make antilock brakes optional on trucks and trailers, a jury in Georgia or Maine or California might decide that antilock brakes are required to meet a common law duty of care. On the other hand, juries in Alabama or New Hampshire or Oregon might decide that antilock brakes are dangerous and breach common law standards in those jurisdictions. The adverse effects on safety and interstate commerce of nonuniform standards are clear. Furthermore, the importance of this issue extends beyond national motor vehicle safety to drugs, medical devices,

pesticides, and numerous other areas of federal health and safety regulation where federal uniformity is critical.

This Court should correct the Eleventh Circuit's unprecedented misinterpretation of *Cipollone*, which would bring about "a radical reworking of our law" (*Osborne* v. *Ohio*, 495 U.S. 103, 119 (1990)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1994

No. 94-286 (H)

MOTION FILED
SEP 19 1994

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK and EMILY MYRICK,
Respondents.[1]

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE TRUCK TRAILER MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

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14 pp

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Truck Trailer Manufacturers Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The consent of the attorneys for the respondent was requested but refused.

The interest of the Truck Trailer Manufacturers Association ("TTMA") in this case arises from the fact that its members will be directly and dramatically affected by

the decision of this Court. TTMA is an association composed of truck trailer manufacturers and suppliers throughout the United States as well as in Canada and Europe. Its members manufacture over 90% of the total annual production of truck trailers in the United States—more than 200,000 such trailers each year. These products are the subject of extensive regulation by the National Highway Traffic Safety Administration, which has issued hundreds of regulations governing trailer design, manufacture and performance. These regulations were promulgated pursuant to 15 U.S.C. § 1392, the enabling statute under review in this case. With respect to each such regulation, the issue of federal preemption and the need for consistent rulings throughout the United States are of paramount importance to TTMA members. TTMA submits this brief amicus curiae to address the unsettling effect of the ruling of the Court of Appeals below, as well as its potential impact on regulations other than the anti-lock brake system regulation that is the focus of the petition for writ of certiorari.

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September 19, 1994

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE TRUCK TRAILER MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Truck Trailer Manufacturers Association ("TTMA") is an organization whose members include firms engaged in manufacturing large truck or tractor pulled trailers, as well as firms supplying these manufacturers with materials, components or services. TTMA members manufacture over 90% of the total annual pro-

duction in the United States of truck trailers, tank trailers, cargo containers, cargo tanks for trucks, and container chassis. These products are designed for and are used extensively in interstate transportation. They are the subject of detailed regulation by the National Traffic Safety Administration ("NHTSA").

The petition for writ of certiorari filed in this case challenges the ruling by a divided three-judge panel of the United States Court of Appeals for the Eleventh Circuit on the federal preemptive effect that must be given NHTSA regulations. TTMA's members are uniquely interested in the outcome of the petition. This case will determine whether TTMA members can rely on NHTSA safety standards (which they must follow) to ensure national uniformity for interstate transportation, as envisioned by Congress and where NHTSA so specifies, or whether disparate jury verdicts assigning State common law tort liability will be permitted, even where such results conflict directly with NHTSA safety standards.

SUMMARY OF ARGUMENT

NHTSA has found—as a matter of Federal law—that the use of airbrakes without antilock devices is reasonable and safe. Respondents demand that a State common law jury be allowed to find—as a matter of State law—that the use of airbrakes without antilock devices is unreasonable and unsafe. The Supremacy Clause mandates preemption of any such conflicting State law.

ARGUMENT

Congress enacted the National Traffic and Motor Safety Act in 1966 to protect "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and . . . against unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1). To accomplish this end, the Safety Act authorized the Secretary of Transportation to promulgate federal motor vehicle safety standards having nationwide applicability. Under the Secretary's direction, the National Highway Transportation Safety Administration ("NHTSA") has issued a multitude of such standards governing in detail the design, manufacture and performance of conventional truck and tractor pulled trailers and other special use cargo tanks and trailers.

That these standards were intended to ensure national uniformity where specified by NHTSA is plainly evident in the preemption clause of the enabling statute, Section 1392(d), which provides in part:

> (d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d).

This goal of national uniformity where specified by NHTSA is of particular importance, as the trailers involved in this case, like thousands of similar trailers manufactured by members of TTMA each year, are designed for and in fact are utilized in interstate transportation. To allow the imposition of varying safety standards from

State to State could render the interstate use of these trailers a practical impossibility. Integrated trailer components designed to comply with NHTSA safety standards cannot be altered in the midst of interstate transport. Brake assemblies and other types of safety equipment simply cannot be interchanged at State lines to comply with a multitude of varying liability standards imposed by common law juries having differing inclinations from NHTSA.[1]

Against the unambiguous preemptive command of Section 1392(d) must be compared the savings clause of Section 1397(k), which provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from liability under common law." 15 U.S.C. § 1397(k).

[1] The preemption clause of the Safety Act does, under certain circumstances, permit imposition of performance standards that are higher than the otherwise applicable NHTSA standards. However, this permitted variance is limited to vehicles obtained for a government's "own use," 15 U.S.C. § 1392(d), and very few such vehicles are utilized regularly in interstate transportation. This limited exception only reinforces the stated intent of Congress that NHTSA safety standards preempt non-identical State standards for all other vehicles and equipment. The text of the Safety Act simply does not provide that a State may impose higher safety performance standards for all vehicles operated within the State regardless of use or ownership. Such higher standards are permissible only if the applicable NHTSA standards are defined as minimum performance standards, thereby indicating that higher standards imposed by States would not conflict with the Federal standards.

This case however, does not involve a NHTSA safety standard that is defined as a minimum standard. Rather, the NHTSA regulation of antilock brake systems defines their required performance if manufacturers elect to install them on trailers, but the regulation expressly does not require installation of antilock brake systems. *See* 44 Fed. Reg. 46,849 (1979). As will be shown, a State court jury verdict that does require installation of antilock devices in order to avoid common law liability would conflict with the NHTSA regulation. Under Section 1392(d) of the Safety Act, States lack authority to establish and enforce such safety standards.

This provision is entirely consistent with Section 1392(d). The savings clause simply affirms the intent of Congress that the safety standards promulgated by NHTSA not preempt *all* common law claims through implied field preemption.[2] In other words, the mere fact that certain aspects of a trailer's performance are regulated by Federal standards does not mean that State common law claims based on other unregulated aspects of its performance are barred. Rather, those common law claims are expressly preserved by the savings clause. Likewise, common law claims based on an alleged failure to comply with Federal standards—*per se* negligence claims, for example—are not barred. Nor are common law claims based on negligent or defective design or manufacture in implementing Federal safety standards. The savings clause preserves these common law claims as well. Only common law claims predicated on safety standards that conflict with Federal standards applicable to the same aspect of the trailers' performance are barred.

This consistent reading of the preemption clause in Section 1392(d) and the savings clause in Section 1397(k) gives both provisions the logical meaning Congress intended, and it preserves national uniformity on those aspects of performance for which NHTSA has issued safety standards that require uniformity. This reading of the two clauses is also supported by long-standing precedent. In *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915), the Court examined a similar savings clause and concluded that it simply

[2] Field preemption is one of three types of preemption long recognized by this Court. It rests on a determination that Congress enacted a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" and therefore the entire field of conduct is governed exclusively by Federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

meant Congress did not intend field preemption. *See also Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981). The same ruling should adhere in this case.

If the preemption clause and savings clause are not to be read in this consistent manner, but rather are given the interpretation of the two-judge majority of the Eleventh Circuit panel below, then the preemption clause in the final analysis will be meaningless. Common law jury determinations that impose safety standards which conflict with standards promulgated by NHTSA would, applying the decision below, prevail in all cases despite the prohibition contained in the preemption clause against State enforcement of any standard "which is not identical" to the Federal standard. 15 U.S.C. 1392(d). This reading of the Safety Act does *not* give meaning to both the preemption and savings clauses, and instead arrogates to individual State common law juries the power to establish conflicting safety standards.

By contrast, the approach suggested by petitioners and TTMA leaves the responsibility for defining appropriate safety standards with the agency Congress established for that purpose. Under this approach, the safety standards are promulgated by neutral, experienced safety experts following notice and an opportunity for comment by all interested parties, including industry representatives, consumers, and State representatives who may wish to participate. This approach does not favor any of the interested parties, and it ensures nationwide uniformity where appropriate.

In any event, the reasonableness of this approach demonstrates that the interpretation of the preemption and savings clauses by the Court of Appeals below is at least debatable, and for that reason, the text of the Safety Act does not alone provide a "reliable indicium of Congressional intent" such that only express preemption need be examined. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct.

2608, 2618 (1992). Although in the eyes of two of the judges below this requirement "is not much of a hurdle," TTMA submits that, if not entirely consistent in meaning as suggested above, then the preemption clause and savings clause reflect sufficient inconsistency to require consideration of conflict preemption not considered by the Court below. This issue should be fully briefed and argued before this Court.

If the petition in this case is not granted, it will be impossible for TTMA members to rely on NHTSA safety standards, and particularly the brake system regulation at issue in this case. One jury may find that antilock brake systems should have been installed, as the respondents in this case argue. Another jury in another State may conclude that antilock brake systems create greater public danger than airbrakes without antilock devices and should not be installed.[3]

NHTSA regulations cover numerous aspects of trailer design and construction. See, for example, 49 C.F.R. §§ 571.106 (brake hoses), 571.108 (lamps and reflecting devices), 571.119 (pneumatic tires), 571.120 (tire selection and rims), 571.121 (airbrake systems) and 49 C.F.R. §§ 393 Subpart B (lighting devices and reflectors) and Subpart I (cargo securement systems and trailer front-end structure). If State common law juries can impose liability on trailer manufacturers under standards that conflict with NHTSA safety standards such as these, then these NHTSA regulations will have no practical effect and the preemption clause of the Safety Act will be rendered a nullity. If NHTSA requires red reflectors, for

[3] It was precisely the "strong probability that the performance of a substantial number of vehicles whose braking systems had been altered to include . . . antilock devices has created a potentially more hazardous highway situation" which caused the United States Court of Appeals for the Ninth Circuit in *Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632, 643 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), to order the suspension of the then mandatory antilock brake regulation.

example, and a jury later finds that blue would have been safer, the manufacturer cannot comply with one rule without violating the other. To avoid liability under State law, the manufacturer must install blue reflectors even though to do so would violate the NHTSA safety standard. If a common law jury in some other State concludes that still another reflector color should have been used, then the manufacturer is further compromised by an inability to satisfy both State laws.

The conflict between Federal and State law is no less direct in this case simply because NHTSA permits manufacturers to choose among antilock and non-antilock brake systems. The respondents' common law claims rest on the allegation that it was unreasonable for the manufacturers not to install antilock brakes. In other words, the respondents must prove and the jury must find, as a matter of State law, that the use of airbrakes without antilock devices was unreasonable. By contrast, the NHTSA safety standard reflects a finding, as a matter of Federal law, that the use of non-antilock airbrakes is a reasonable alternative.

This is the essence of the conflict between State and Federal law in this case. If a jury is allowed to return the finding requested by respondents, then the finding by NHTSA that non-antilock brakes constitute a reasonably safe alternative will be completely negated and the preemption clause of the Safety Act will have no meaning at all.

CONCLUSION

For these reasons, TTMA respectfully submits that the Petition for Writ of Certiorari should be granted in this case.

Respectfully submitted,

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NOV 16 1994
OFFICE OF THE CLERK

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 15, 1994
CERTIORARI GRANTED OCTOBER 7, 1994

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RELEVANT DOCKET ENTRIES

Date	Proceedings
3/1/91	Complaint filed in *Myrick*, Dist. Ct. #1:91-CV-0465-JOF
3/1/91	Answer to Complaint by Freightliner Corp. in *Myrick*
5/15/91	Complaint filed in *Lindsey*, Dist. Ct. #1:91-cv-1128-MHS
5/15/91	Answer to Complaint by Navistar Int'l Transp. Corp., International Harvester Co. in *Lindsey*
7/15/91	Motions for defendant Freightliner Corp. and defendant Navistar Int'l for summary judgment
9/5/91	Responses by plaintiff Myrick and plaintiff Lindsey to motions for summary judgment
9/5/91	Notice of filing videotape cassette entitled "Tractor Trailer Braking Performance 75-16-GR-7 'Com 60' 'F-001350'" by plaintiffs in support of Responses to defendants' motions for summary judgment in *Myrick* and *Lindsey*
3/26/92	ORDER in *Myrick* Granting motion for summary judgment by Freightliner Corp.
3/30/92	ORDER in *Lindsey* Granting motion for summary judgment by Navistar Int'l
4/14/92	JUDGMENT entered in *Lindsey*, Dist. Ct. #1:91-cv-1128-MHS
4/22/92	Notices of Appeal filed in *Myrick*, Ct. of App. #92-8386 and *Lindsey*, Ct. of App. #92-8387
5/22/92	JUDGMENT entered in *Myrick*, Dist. Ct. #1:91-CV-0465-JOF
6/1/92	Notice of Appeal filed in *Myrick*, Ct. of App. #92-8536
6/29/92	ORDER Granting motions to consolidate 92-8386 and 92-8387

Date	Proceedings
7/15/92	ORDER Granting motions to consolidate 92-8536 with 92-8386 and 92-8387
2/11/94	Decision of the Court of Appeals
5/18/94	ORDER Denying Rehearing and Rehearing En Banc
7/15/94	ORDER Granting Appellees' motion for further stay of the issuance of mandate
10/7/94	ORDER Granting Petition for a Writ of Certiorari

IN THE STATE COURT
OF FULTON COUNTY GEORGIA

Civil Action File No. 91VS31583B

BEN MYRICK and EMILY MYRICK,
Plaintiffs,
v.
FREUHAUF CORPORATION and
FREIGHTLINER CORPORATION,
Defendant

COMPLAINT

Plaintiffs make the following complaint against the defendants.

1.

Defendant FREUHAUF CORPORATION is a foreign corporation having a registered office in Fulton County, Georgia and a registered agent upon whom service can be perfected. This defendant is hereinafter referred to as "FREUHAUF".

2.

FREUHAUF's registered agent is CT Corporation System, Two Peachtree Street, NW, Atlanta, Georgia 30383.

3.

FREUHAUF is subject to the jurisdiction of this court.

4.

FREIGHTLINER CORPORATION is a foreign corporation having a registered office in Fulton County, Georgia. It has a registered agent upon whom service may be perfected. This defendant is hereinafter referred to as "FREIGHTLINER".

5.

FREIGHTLINER may be served by serving its registered agent, CT Corporation System, Two Peachtree Street, NW, Atlanta, GA 30383.

6.

FREIGHTLINER is subject to the jurisdiction of this court.

7.

FREUHAUF CORPORATION manufactured a certain trailer unit, VIN No. 3EKA15542. It was a 1984 pine dry van.

8.

When manufactured by this defendant, and sold as new, said van was unreasonably safe for the purposes for which it was intended, and was defective, because it was not equipped with an anti-lock braking system.

9.

Defendant FREUHAUF negligently designed and manufactured said trailer in that it failed to equip the said trailer with anti-lock brakes.

10.

Defendant FREIGHTLINER manufactured and sold as new a 1987 Freightliner Tractor, VIN No. 1FUYYRYB-6HP289872.

11.

Said tractor was defective in that it was not equipped with anti-lock brakes.

12.

Said tractor was negligently designed and manufactured in that it did not have an anti-lock braking system.

13.

On or about February 6, 1989, Jerome Edwards Bardot was driving the Freightliner tractor described above and was pulling the Freuhauf trailer described above.

14.

He was proceeding southbound on US Highway 441 in Morgan County, Georgia.

15.

At the time, the road was wet.

16.

The road in question was a two lane higway.

17.

Plaintiff BEN MYRICK was proceeding northbound on Highway 441, driving a tractor-trailer rig for Fowler Flemister Concrete, Inc.

18.

Mr. Bardot applied the brakes of the FREIGHTLINER-FREUHAUF combination tractor-trailer in order to slow down because of traffic in front of him.

19.

When Mr. Bardot applied the brakes, the brakes locked, and caused the trailer to skid into the path of the rig driven by BEN MYRICK.

20.

The FREUHAUF trailer struck the truck driven by BEN MYRICK in a violent manner.

21.

In the collision, the cab was torn off the truck driven by MR. MYRICK, and MR. MYRICK was thrown out of the cab despite the fact that he was wearing a seat belt.

22.

MR. MYRICK suffered closed head injuries, abdominal injuries and spinal injuries.

23.

MR. MYRICK is permanently paraplegic and brain damaged.

24.

MR. MYRICK has been damaged through the loss of income, through the incurring of medical expenses and has undergone pain and suffering, both physical and mental, and will continue to do so for the rest of his life.

25.

EMILY MYRICK is the wife of BEN MYRICK and has lost the companionship and consortium of her husband, BEN.

26.

BEN MYRICK is entitled to recover for his damages which he has incurred in the form of pain and suffering, medical expenses and lost earnings.

27.

EMILY MYRICK is entitled to recover for the loss of consortium of her husband, BEN.

28.

The damages sought herein are due from the defendants jointly and severally for failing to equip their respective parts of the tractor-trailer unit with anti-lock brakes.

29.

These defendants knew, or should have known, that anti-lock brakes would have prevented the loss of control of the tractor-trailer rig driven by Mr. Bardot.

30.

Nevertheless, the defendants, along with other manufactures of tractor-trailer rigs, made a conscious decision not to equip their vehicles with anti-lock brakes, despite the fact that it had been demonstrated clearly that tractor-trailer rigs equipped with anti-lock brakes would not jack-knife under the circumstances of this collision.

31.

The damages suffered by the plaintiffs are the direct and proximate result of the joint and several negligence and strict liability of these defendants.

32.

Defendants engaged in a pattern of mail and wire fraud in order to proclude the government from passing regulations requiring anti-lock brakes on tractor-trailer rigs such as the one in question.

33.

They, through their agents, engaged in lobbying activities and other political campaigns as well as combinations and restraint of trade in order to proclude the use of anti-lock brakes as a requirement on their products.

34.

Accordingly, they have jointly and severalty violated the Georgia RICO Act and are therefore liable for treble damages as a result.

WHEREFORE, plaintiffs demand judgment against the defendants, jointly and severally, in such amounts as a jury, in its enlightened conscious, may determine for the pain and suffering, medical expenses, lost earnings and lost of consortium as set forth above.

Plaintiffs further demand treble damages for the defendants' violation of the Georgia RICO Act.

Plaintiffs further demand expenses of litigation including a reasonable amount as attorney's fees as allowed by the Georgia RICO Act.

Plaintiffs further demand a trial by jury in the above-captioned case.

THE CARTER FIRM

By: /s/ James E. Carter
JAMES E. CARTER

THE CARTER FIRM
P.O. Box 509
Madison, GA 30650
404-342-4722

MATHIS, SANDS, JORDON & ADAMS

By: /s/ Charles Mathis
CHARLES MATHIS

MATHIS, SANDS, JORDON & ADAMS, P.C.
425 South Wayne Street
Milledgeville, GA 31061
912-453-9387

IN THE STATE COURT
OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. 91VS35765-E

JACK LINDSEY, Executor of the Estate of GRACE C. LINDSEY, Deceased and JACK LINDSEY, As Surviving Spouse of GRACE C. LINDSEY, Deceased,
Plaintiffs,

v.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP. and INTERNATIONAL HARVESTER COMPANY,
Defendants.

COMPLAINT

COMES NOW Plaintiff Jack Lindsey and files this his Complaint against Defendants NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION and INTERNATIONAL HARVESTER COMPANY.

1.

Defendants are corporations registered to do business in the State of Georgia. They each have as their registered agent C. T. Corporation System, 2 Peachtree Street, N.W., Atlanta, Georgia 30383, at which address service may be perfected on the defendants.

2.

Defendants are subject to the jurisdiction of this court.

3.

Defendant NAVISTAR INTERNATIONAL TRANSPORTATION CORP. is, upon information and belief, the

successor in interest to INTERNATIONAL HARVESTER COMPANY, and is liable for acts and omissions of INTERNATIONAL HARVESTER COMPANY.

4.

Upon information and belief, one or both of these defendants manufactured, designed and sold as new a certain 1982 International tractor Model CO9670, VIN 1HTL2327HCGA15401.

5.

When designed, manufactured and sold as new, said tractor was not equipped with anti-lock brakes.

6.

Failure to supply anti-lock brakes on said tractor is negligent design.

7.

Failure to supply anti-lock brakes on said tractor renders the tractor defective.

8.

On or about September 5, 1989, Tim Williams was driving said tractor while hauling a trailer in a southbound direction on U.S. Highway 441 in Oconee County, Georgia.

9.

At said time and place, GRACE C. LINDSEY was driving her vehicle in a northbound direction.

10.

The driver of the International tractor locked the brakes of the tractor-trailer rig in an attempt to stop in order to avoid another vehicle in the southbound lane.

11.

The tractor-trailer rig "jackknifed", and the tractor crossed the center line into the path of the Lindsey ve-

hicle. In the collision, GRACE C. LINDSEY sustained fatal injuries, underwent pain and suffering and died as result of said injuries.

12.

The collision, the pain and suffering, the medical expenses, the funeral expenses and death of GRACE C. LINDSEY are the direct and proximate result of the negligence of these defendants.

13.

The aforementioned injuries and expenses are the result of the defective International tractor.

14.

Plaintiff JACK LINDSEY is entitled to recover of the defendants jointly and severally the full value of the life of his deceased wife, GRACE C. LINDSEY.

15.

Plaintiff JACK LINDSEY as Executor of the Estate of GRACE C. LINDSEY is entitled to recover of the defendants jointly and severally damages for pain and suffering, medical expenses and funeral expenses of GRACE C. LINDSEY.

16.

Omitting anti-lock brakes from the tractor in question was done by the defendants with a conscious indifference to the consequences to plaintiff.

17.

As result thereof, Plaintiff JACK LINDSEY as Executor of the Estate of GRACE C. LINDSEY is entitled to recover of the defendants jointly and severally punitive damages in such amounts as may be necessary to deter the defendants from committing such acts of defective design in the future.

18.

Plaintiff's special damages, medical expenses and funeral expenses will be shown more particularly by amendment to this complaint or through discovery.

WHEREFORE, Plaintiff JACK LINDSEY as the surviving spouse of GRACE C. LINDSEY, deceased, demands judgment for the full value of the life of his deceased wife, GRACE C. LINDSEY, in such amounts as a jury may in its enlightened conscience deem appropriate.

Plaintiff JACK LINDSEY, Executor of the Will of GRACE C. LINDSEY, deceased, demands judgment against the defendants jointly and severally for the medical expenses, funeral expenses and pain and suffering of GRACE C. LINDSEY, deceased.

Plaintiff JACK LINDSEY, Executor of the Will of GRACE C. LINDSEY, demands punitive damages against the defendants jointly and severally.

Plaintiffs demand that costs of court be taxed against the defendants.

Plaintiffs further demand a trial by jury of all issues in this case.

THE CARTER FIRM

By: /s/ James E. Carter
JAMES E. CARTER
Georgia Bar #114400

Post Office Box 509
Madison, Georgia 30650
(404) 342-4722

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA, GEORGIA

Civil Action File No.: 1:91-CV-465-JOF

BEN MYRICK and EMILY MYRICK,
Plaintiffs,

v.

FREUHAUF CORPORATION and
FREIGHTLINER CORPORATION,
Defendants.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF OHIO
COUNTY OF LOGAN

Before the undersigned office duly authorized to administer oath personally BILLY S. PETERSON, who, having been first duly sworn, states on oath as follows:

1.

My name is BILLY S. PETERSON. I am of age and sui juris in every respect.

2.

A recent curriculum vitae is hereto attached.

3.

This affidavit is made upon by personal knowledge.

4.

By virtue of my education, training and experience, I am familiar with the standards applicable to air brake systems on trucks, known as Standard No. 121 of the Federal Motor Vehicle Safety Standards as enacted by

Congress and as administered by National Highway Traffic Safety Administration.

5.

I am also familiar with the history of Standard 121, and I am aware that at one time, following a testing program, that Standard 121 required the use of anti-lock brake systems on motor vehicles such as the one in question in this case.

6.

I am further aware that after Standard 121 was invalidated in part by *Paccer, Inc. v. National Highway Traffic Safety Administration,* 573 Fed. 2d 632. That Standard 121 was amended so as to render sections S5.3.1, S5.3.1.1, S5.3.2., S5.3.2.1, S5.3.2.2, S5.7.1, S5.7.3(a) and S5.7.3(b) inapplicable to trucks and trailers.

7.

I am also familiar with the remaining portions of Standard 121.

8.

The remaining sections of Standard 121 apply to a vehicle whether or not it is equipped with anti-lock brakes except for Section S5.1.6 which provides for a continuous anti-lock warning signal on any vehicle equipped with an anti-lock system.

9.

There are no regulations in Standard 121 which regulate of brake system which a tractor or trailer must have.

10.

Section S5.1.1, S5.1.2, S5.1.2.1, S5.1.2.2, S5.1.2.3, S5.1.2.4, S5.1.3, S5.1.4, S5.1.5, S5.1.7, S5.1.8, S5.2 and all of its sub-sections, S5.3.3, S5.3.3.1 and the remainder of Standard 121 apply to any tractor-trailer rig whether equipped with anti-lock brakes or not.

11.

I am familiar with the state of the art and the availability of mass-produced anti-lock brake systems for the vehicle in question.

12.

It is my opinion that prior to the time of the manufacture of the vehicle in question, the state state of the art was such that anti-lock brakes could be reliably manufactured in mass production for use in over-the-road tractors and trailers such as the vehicle in question.

13.

It is my further opinion that any tractor or trailer manufactured after 1980 without anti-lock brakes is defective and unreasonably dangerous, because a tractor-trailer rig equipped with anti-lock brakes will not jackknife, and will be controllable while stopping, even with maximum brakes applied by the driver.

Affiant further sayeth not.

/s/ Billy S. Peterson
BILLY S. PETERSON

Sworn to and subscribed before me this 3rd day of September, 1991.

/s/ Glinda S. Herron
Notary Public,
Logan County, Ohio

RESUME

Billy S. Peterson

EDUCATION:

B.S. Mechanical Engineering—1961
North Carolina State University
Raleigh, North Carolina

Additional Courses in:

Personnel Management
Industrial Management
Technical Writing
Computer Programming
Procurement Management
Several Electrical Engineering Courses

WORK HISTORY:

March 1, 1985 to Present

President
Automotive Safety Testing, Inc.
Located at TRC of Ohio
East Liberty, Ohio 43319

Technical consultant and principal investigator for Automotive Safety Testing Corporation. Areas of responsibility include: preparing safety design specifications; interpreting and analyzing Federal Safety Standards and test procedures; conducting crash, braking and other safety related tests for vehicle manufacturers and distributors.

Consultant and expert witness in automotive product liability and negligence investigations and testing, including accident reconstruction and product defects.

March 1, 1985 to Present

Private Consultant to TRC

Currently serve as private consultant to TRC as Technical Advisor on Federal Government research and other programs.

February 23, 1984 to February 28, 1985

Director, Government Affairs
TRC of Ohio
East Liberty, Ohio 43319

Responsible for all engineering and technical contact with the National Highway Traffic Safety Administration and other government agencies. Project Manager for TRC on all Federal government research and test programs, including new car assessment crash tests, compliance crash tests (frontal, rear, and side), and rollover research and development testing. Represented TRC at technical conferences and symposiums sponsored by the National Highway Traffic Safety Administration, Federal Aviation Administration, Department of Defense, and Society of Automotive Engineers.

August 1, 1976 to January 15, 1983

Chief, Project Engineering
Vehicle Research & Test Center
National Highway Traffic Safety Administration
U.S. Department of Transportation
East Liberty, Ohio 43319

Served as technical and administrative manager of all product defect investigations of automobiles, trucks, buses and other vehicles and equipment. Provided evidence for determination of product defect and possible recall by the National Highway Traffic Safety Administration.

Managed research and development crash and simulation test programs conducted at the TRC of Ohio. Acted as technical advisor during the de-

velopment and construction of the Crash Test Facility at TRC.

March 27, 1970 to July 29, 1976

Safety Standards Engineer
National Highway Traffic Safety Administration
U.S. Department of Transportation
Washington, D.C. 20590

Responsible for developing Federal Motor Vehicle Safety Standards. Direct duties included evaluating requirements, establishing criteria, analyzing comments and working with the legal staff in writing the final standards and regulations.

Conducted crash test programs to support rulemaking efforts, reporting directly to the Associate Administrator of Motor Vehicle Programs. Test programs included car and truck rollovers, side impact, rear impact, car-to-car, car-to-school bus, and moving barrier-to-car.

July 17, 1967 to March 25, 1970

Group Leader
Senior Thermal-Vacuum Engineer
Sperry Rand Space Support Division
Goddard Space Flght Center
Greenbelt, Maryland

Managed a space enviornment simulation laboratory for testing spacecraft. Directed engineers and technicians in the operation and upgrading of the facilities. Responsible for monitoring spacecraft during test through a computerized data collection system. Other duties consisted of directing engineers on special projects, reviewing reports and procedures and setting standards for operation and testing.

November 17, 1966 to July 1, 1967

Staff Engineer
Riegel Paper Corporation
Riegelwood, North Carolina

Determine instrumentation needed to computerize plant equipment.

May 1, 1965 to November 15, 1966

Aerospace Technologist (Technical Management)
Thermodynamics Branch
National Aeronautics and Space Administration (NASA)
Goodard Space Flight Center
Greenbelt, Maryland

Technical assistance to the chief of Thermodynamics Branch. Technical monitor over contractor in charge of space simulation facilities (approximately 55 on-site contract employees). Supervised ten NASA personnel during spacecraft instrumentation setup and during test monitoring.

April 1, 1963 to April 30, 1965

Aerospace Technologist (Experimental Equipment)
National Aeronautics and Space Administration (NASA)
Goddard Space Flight Center
Greenbelt, Maryland

Contract monitor working with contractor in the construction and calibration of a large space environment simulation facility.

June 15, 1961 to March 29, 1963

Project Engineer
Automotive Division
U.S. Army—Aberdeen Proving Ground
Aberdeen, Maryland

Developed and tested armor and weapon systems. Translated technical and administrative requirements into a program plan, estimated cost of program,

directed work on program, analyzed data from tests and wrote a formal report upon completion of program.

September 1956 to June 1961

Student
North Carolina State University
Raleigh, North Carolina

Break in enrollment from 6/57 to 1/58—Worked as an electrician.

March 1956 to September 1956

Electrical Technician
Riegel Paper Corporation
Riegelwood, North Carolina

Repair and maintenance of electrical controls.

March 1952 to February 1956

Electricians Mate Second Class
U.S. Navy

Repair and Maintenance of electrical controls.

PROGRAMS COMPLETED UNDER MY DIRECTION

Air Bag Testing

Passive Safety Belt Evaluation

New Car Assessment Program

Restraint Model Validation Tests

Compatibility of Belt System Comfort/Convenience with Crash Performance Requirements.

Baseline Vehicle Side Impact Testing

Rollover Procedure Development

Dynamic Testing for Improvement of Computer Simulation Models

Glazing Material Testing

Anthropomorphic Test Device Calibration Procedures

Side Impact Test Procedures

Validation of Frontal Load Cell Barrier

Evaluation of Side Impact Dummies

Side Impact Padding Integration Study

Safety Belt Retractor Study

Unrestrained Occupants Test

Automatic Transmission Inadvertant Gear Changes

Safety Belt Buckles Test

Safety Belt Failure

Fuel System Integrity Tests

Uncontrolled Acceleration

Rollbar Integrity Tests

Steering Column Crush Tests

Dual Braking System Failure Tests

Uncontrolled Steering Vibration

Motorcycle Wet Braking

Rear Axle Disengagement

Rear Axle/Differential Lockup

Idler Arm Disengagement

Carbon Monoxide Intrusion

Throttle Control Systems

Multi-Piece Wheel Disengagement

Power Brake Boosters

Hydraulic Brake systems

Master Brake cylinder Failure

Fuel Injection Systems

Wheel Stud Breakage

Carburetor Isolator Failure

Control Pedal Interferences

Trailer Axle Pin Breakage

Seatback/Seatback Latch Failures

Engine Mount Breakage

Premature Brake lockup

Steering Wheel Lockup

Tie-Rod End Disengagement

Liftgate Strut Failure

Panhard Rod Failure

Door Latch Failure

Child Safety Seats

Steering Response

PETITIONER'S

BRIEF

FILED
NOV 16 1994
OFFICE OF THE CLERK

No. 94-286

(7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,

v.

BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,

v.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR PETITIONERS

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60 pp

QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act preempts state common-law standards that conflict with federal standards adopted pursuant to the Act for reasons of safety and practicability; or whether, as the Eleventh Circuit held, one passage in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992), forecloses such preemption.

RULE 29.1 STATEMENT

Petitioner Freightliner Corporation has no subsidiaries other than wholly owned ones. Its parent corporations are Daimler-Benz North America Corporation and Daimler-Benz A.G. Petitioner Navistar International Transportation Corp. is a subsidiary of Navistar International Corporation. Navistar International Transportation Corp. owns more than 99% of Grimsby Insurance Co., Ltd., which is not publicly traded.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-286

FREIGHTLINER CORPORATION,
Petitioner,

v.

BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,

v.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 13 F.3d 1516. The opinion of the district court granting Freightliner summary judgment against the

Myrick respondents (Pet. App. 34a-42a) is reported at 795 F. Supp. 1139. The opinion of the district court granting Navistar summary judgment against respondent Lindsey (Pet. App. 46a-47a) is unreported.

JURISDICTION

The court of appeals entered judgment on February 11, 1994. Pet. App. 1a. Rehearing was denied on May 18, 1994. Pet. App. 48a-49a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This Court granted the petition for a writ of certiorari on October 7, 1994.

STATUTORY PROVISIONS INVOLVED

The case involves the National Traffic and Motor Vehicle Safety Act of 1966. Portions of the Act, in the codification at issue in this case and as recently recodified, are set forth in an appendix to this brief.

STATEMENT

A divided court of appeals held that state common law is immune from preemption under the National Traffic and Motor Vehicle Safety Act regardless of any actual conflict (as in this case) between the common-law standard and federal law. In particular, the court ruled that ordinary conflict preemption was all but automatically ousted by the existence of federal provisions expressly addressing the scope of state authority, resting this holding on its view that one brief passage in this Court's opinion in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), altered familiar preemption analysis. Petitioners challenge the rejection of preemption in this case.

A. Federal Statutory Framework

The National Traffic and Motor Vehicle Safety Act was enacted in 1966 to provide for national safety stand-

ards for motor vehicles. The Act, as relevant here,[1] directs the Secretary of Transportation—now through his delegee, the National Highway Traffic Safety Administration (NHTSA)—to regulate motor vehicle safety by promulgating national safety standards. 15 U.S.C. § 1392. It provides that the standards "shall be practicable, shall meet the need for motor vehicle safety and shall be stated in objective terms." *Id.* § 1392(a). *See also id.* § 1392 (f)(3). It defines "motor vehicle safety" to mean protection "against unreasonable risk of accidents" and "unreasonable risk of death or injury" when accidents do occur. *Id.* § 1391(1). It gives the agency extensive authority and responsibility to conduct investigations, testing, and research to make the needed determinations of safety and practicability (*id.* §§ 1395, 1401) and requires manufacturers to inform the agency of safety-related defects (*id.* § 1411).

The statute addresses the matter of state authority in several provisions. It provides for States to play a consultative role in the agency's standard-setting process. *Id.* § 1392(f)(2). It also provides (*id.* § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

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[1] In the summer of 1994, Congress recodified the Act, as well as all of Title 49, U.S. Code, and various other statutes concerning transportation. Pub. L. No. 103-272, 108 Stat. 745. Because the pre-1994 version of the Act is at issue in this case, and because Congress made clear that the recodification was made "without substantive change" (*id.* at 745; *see id.* at 941), we use the earlier codification of the Act in this brief.

That provision is immediately followed by two specific exceptions allowing States to enforce standards on safety matters addressed by federal regulations: where the state standard is identical to the federal standard; and where vehicles used by the state government itself are involved. *Id.* § 1392(d). A subsequent provision of the Act, in a section detailing the prohibitions (and exemptions) applicable to manufacturers, adds: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

B. Standard 121: Air Brakes

Exercising its statutory responsibility, NHTSA has issued safety standards addressing numerous safety aspects of vehicle design and performance. 49 C.F.R. pt. 571. The regulation at issue in this case governs safety relating to air brake systems. 49 C.F.R. § 571.121 (Standard 121). At all times relevant to this case, the regulation has specifically provided that trucks were not to be subjected to a performance requirement that could be achieved only by, and hence in effect compels, the use of antilock brake systems (ABS) attached to the air brake systems. According to the Ninth Circuit, an "extensive," "comprehensive" administrative record compelled the conclusion that such a requirement would itself create safety problems. *Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632, 640, 643 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978).

1. The Initial Rulemaking

The brakes on most heavy trucks are air brakes, which produce friction at the brake drum by transmitting air pressure (instead of hydraulic pressure, as in most automobiles) through hoses running to the brake chambers. "Antilock brake systems" are not a different kind of braking mechanism; rather, they are computerized devices attached to the air brake systems. These devices sense when a wheel begins to "lock up," *i.e.*, to cease rotation

and lose traction suddenly. A locked wheel causes the vehicle to skid rather than slow and, if the lock-up is not laterally symmetrical, can produce a violent swerve against the direction of the skid. The antilock device, sensing the initial stages of lock-up, momentarily releases the braking pressure on the wheel, allowing it to regain traction and avoid the skid.

Standard 121, addressed to air brakes, was developed and repeatedly revised in a comprehensive rulemaking proceeding that began in 1967. After several delays necessitated by evidence of problems in the proposed requirements, followed by revisions in the rules, the standard took effect for trucks in March 1975. The rule did not mention antilock devices by name, but rather prescribed minimum stopping distances at certain speeds, without swerving from a 12-foot lane or encountering more than momentary lock-up of any wheel. It was "beyond doubt," however, that these requirements could be met only by the installation of antilock sensing and control devices, in addition to the redesign of numerous aspects of the air-brake systems. *See Paccar*, 573 F.2d at 639 n.26; *id.* at 641 (40,000 new part numbers required).

Not only truck manufacturers, but owners, drivers, and state safety officials voiced challenges to the imposition of this standard—challenges that led NHTSA itself to continue rulemaking hearings, and make revisions, even after promulgation of the standard. *Paccar*, 573 F.2d at 637-38. As reflected in the identity of the challengers, the concern was not limited to issues of cost but rather focused on the safety and practicability of such devices as used on heavier vehicles. Strong evidence showed that, in the case of heavy vehicles, the additions and modifications required by the standard, when coupled with antilock devices, caused more dangers than they cured, thereby creating new dangers not previously present.[2] Among

[2] *Paccar*, 573 F.2d at 637 ("In early 1974, the agency began to receive continual complaints to the effect that antilock devices were unreliable, and rendered vehicles dangerously unsafe when com-

other problems, the sensing function of the antilock devices encountered a high level of unexplained failures, leading to increased possibilities of accidents related to wheel lock-ups. The devices were also difficult to maintain, and the computer was susceptible to electromagnetic interference from various sources, including radio and radar, reportedly causing the ABS to cease functioning suddenly and unpredictably or, in the extreme, disabling application of the foundation brakes themselves, with highly dangerous consequences. *Id.* at 637-38, 641. NHTSA itself acknowledged some of these problems. *Id.* at 638.

2. *The Ninth Circuit Ruling*

Paccar, a truck manufacturer, joined by the American Trucking Association and the Truck Body and Equipment Association, challenged Standard 121 in the Ninth Circuit. Their most vehement criticism was that "it is not a 'reasonable' standard, since the failure of what they consider an unreliable device, the antilock, in a panic braking situation creates a potentially more dangerous situation than a 'prestandard' vehicle because of the new, stronger braking system." *Paccar*, 573 F.2d at 639. The Ninth Circuit agreed.

The court held first that in spite of "NHTSA['s] deni[al] that antilock is required by the Standard, extensive testimony and evidence from the industry, unrebutted [by] agency evidence, convinces us, as a practical matter and beyond doubt, that antilock was necessary to meet the Standard." *Id.* at 639 n.26. On this premise, the court held that "NHTSA has the responsibility to assure that the new systems it requires are reliable when placed in use" (*id.* at 642) and that

> the comprehensive data before us indicate that there is a strong probability that the performance of a

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bined with new, more effective brakes.") (footnote, quoting comments to agency, omitted).

> substantial number of vehicles whose braking systems have been altered to include "overpowered" front axles and antilock devices has created a potentially more hazardous highway situation than existed before the Standard became operative. Therefore, until such time as NHTSA develops evidence that the new braking systems required by the Standard do not create the possibility of greater danger to the public, those parts of the Standard requiring heavier axles and the antilock device should be suspended.

Id. at 643. In short, the agency had acted unlawfully in failing to draw the only permissible conclusion from the extensive evidence in the record: a requirement of antilock devices for trucks itself produced safety problems and could not be justified.

The government sought certiorari from the decision, arguing that the *Paccar* court had impermissibly substituted its judgment for that of the agency. 78-95 Pet. 2, 14-23. Paccar responded that the Ninth Circuit was correct in concluding that the record, far from supporting the imposition of the Standard, contained overwhelming evidence that implementation of the Standard would pose increased hazards to truckers and the public—in other words, that what the agency had done was not only unwarranted, but positively dangerous. Paccar appended numerous documents from users, drivers and their union, the California State Highway Patrol, and the Mass Transit Administration of the Maryland Department of Transportation detailing the hazards entailed by the Standard. 78-95 Br. in Opp. This Court denied certiorari. 439 U.S. 862 (1978).

3. *The Agency Response*

The agency's response to the Ninth Circuit holding was, notably, *not* to attempt to supplement its record to support reintroduction of the antilock requirement. Rather, NHTSA simply added a specific statement that antilock-brake and related requirements were not applica-

ble to trucks and trailers. *See* 44 Fed. Reg. 46849 (1979); 44 Fed. Reg. 53166 (1979); 44 Fed. Reg. 57100 (1979).[3] The agency left in place the performance criteria for those manufacturers who chose to install antilock brakes. *See* 44 Fed. Reg. 46849 (1979). Trucks were then and are now subject to many safety standards for their air brake systems; but the regulations have at all times relevant to this case contained the explicit provision—based directly on the Ninth Circuit's holding as to the safety conclusion compelled by the comprehensive agency record—declaring installation of antilock brakes not to be required. Standard 121 § S3 (regulations requiring antilock brakes "are not applicable to trucks and trailers").

NHTSA's conduct after its post-*Paccar* amendment to Standard 121 confirmed that the problem with the antilock requirement was not merely one of inadequate *evidentiary* support in the record but a substantive problem, the real danger produced by requiring installation on all trucks. Thus, NHTSA did not for years undertake to use any of its extensive research, testing, and investigatory powers (15 U.S.C. §§ 1395, 1401) to develop a record to resolve the safety concerns shown in *Paccar*. Not until the mid-to-late 1980s, after development of a new generation of antilock devices in Europe, did NHTSA begin to study the issue again.[4] *See* NHTSA, *Heavy Truck Safety Study* 92 (DOT HS 807 109, March 1987) ("With the availability of second generation antilock systems, the recent advances in microprocessor technology, and greater acceptance of electronic controls on trucks

[3] NHTSA specifically advised owners of trucks equipped with antilock devices that, while it would not require them to disconnect or remove such devices, if they wished to do so they should consult with the manufacturers and carefully follow their instructions for safe de-activation. 44 Fed. Reg. 9783, 9784 (1979).

[4] Congress acted to require study of the question as well. 49 U.S.C. App. § 2521 Notes (1988 and 1991 statutes).

in the U.S., it appears to be an opportune time to reconsider the issue of antilock use in this country."). As late as 1991 and 1992, NHTSA's technical studies acknowledged the "reports of brake systems failures that were attributed to the ABS" and the "operational and maintenance problems experienced during the [Standard] 121 period," and it stated that "[t]he reliability of these systems remains to be established conclusively."[5]

In 1990, NHTSA announced its intention to consider reinstatement of the antilock-brake requirement, based on the technological advances. *See* 55 Fed. Reg. 44738 (1990). In June 1992, the agency issued an advance notice of proposed rulemaking to achieve that result. *See* 57 Fed. Reg. 24212 (1992). Although indicating repeatedly that action is forthcoming,[6] the agency has not yet issued a final rule establishing an antilock requirement to take effect by a specified date.

C. This Litigation

This case involves two separate but materially identical tort actions. Respondent Ben Myrick was injured in a collision with a tractor-trailer in Georgia. He and his wife, respondent Emily Myrick, brought an action in a Georgia state court against Freightliner, the manufacturer of the tractor.[7] Respondent Jack Lindsey's wife was

[5] NHTSA, *Improved Brake Systems for Commercial Motor Vehicles* [1991 NHTSA Report] § 3, p. 3-15 (DOT HS 807 706, April 1991); NHTSA, *An In-Service Evaluation of the Reliability, Maintainability and Durability of Antilock Braking Systems (ABS) for Heavy Truck Tractors* § 1, p. 1-16 (DOT HS 807 846, March 1992); 1991 NHTSA Report, *supra*, at ES-4.

[6] 49 C.F.R. pt. 571, Docket No. 92-29—Notice 1, 57 Fed. Reg. 24212 (1992); Notice 2, 58 Fed. Reg. 50738 (1993); Notice 3, 58 Fed. Reg. 65156 (1993); Notice 4, 59 Fed. Reg. 17326 (1994).

[7] The suit also named Freuhauf Corporation, a trailer manufacturer, but the case against Freuhauf was dismissed with prejudice by agreement. Pet. App. 3a n.1. Freuhauf is no longer a party to this case.

killed in a collision with a tractor-trailer. As executor and surviving spouse, Lindsey then brought a state-court action against Navistar, whose corporate predecessor had manufactured the tractor. Both suits were removed to federal court in Georgia based on diversity jurisdiction. 28 U.S.C. §§ 1332, 1441. *See* J.A. 3-12 (complaints).

Both actions alleged liability under Georgia law, based entirely on the lack of antilock brakes. In the court of appeals' words, the Myricks "alleg[ed] that the absence of anti-lock brakes was a negligent design and rendered the tractor defective." Pet. App. 3a (footnote omitted). Similarly, Lindsey "alleged that Navistar's failure to supply anti-lock brakes was a negligent design which rendered the tractor defective and unsafe." *Id.* at 3a-4a. *See also* J.A. 13-15 (respondents' affidavit in opposing summary judgment).

Petitioners moved for summary judgment in each case on the ground that, since the federal regulation on braking systems rejects a requirement of antilock brakes (based on safety considerations), the Safety Act preempts respondents' tort law claims alleging that the absence of such brakes is a defective design. The district court in each case agreed. In the *Myrick* case, Judge Forrester concluded:

> Not only would a common law standard requiring the installation of anti-lock devices conflict with the federal standard, it would defeat the policy behind the Safety Act by imposing a design requirement that the Department of Transportation judges to be unsafe, having chosen not to require such devices until they are more reliable.

Pet. App. 41a. In the *Lindsey* case, Judge Shoob adopted Judge Forrester's reasoning as "persuasive." Pet. App. 47a.

D. The Court of Appeals Decision

The court of appeals, in a 2-1 decision, reversed. Pet. App. 1a-33a. The court agreed that conflict preemption,

if available, would apply here, just as it applied in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), which found conflict preemption of a common-law tort action for failure to install a safety device (there, airbags) that the federal regulations on the subject specifically said was not required. Pet. App. 2a. *See id.* at 10a ("In both cases, the claims were premised on a failure of the manufacturers to install specific safety devices in their vehicles, and in both cases a safety standard established under the Act effectively gave the manufacturers the option of not installing the device."). The court concluded, however, that conflict preemption was no longer available, and *Taylor* must be overruled, in light of this Court's decision in *Cipollone*. *Id.* at 2a, 11a.

The majority rested its conclusion on one passage from *Cipollone* (112 S. Ct. at 2618), which it read as adding "a new wrinkle to the fabric of pre-emption law by holding that where a federal statute contains an express pre-emption clause, and that clause 'provides a "reliable indicium of congressional intent with respect to state authority," ' a court should not consider implied theories of pre-emption." Pet. App. 9a-10a; *see also id.* at 14a ("we hold today: where, as here, there is an express pre-emption provision, which constitutes a reliable indicium of congressional intent, implied pre-emption analysis has no place"). The court found that principle applicable to the Safety Act, explaining that the existence of an express preemption provision all but automatically ousts conflict preemption: "the reliable indicium requirement is not much of a hurdle." *Id.* at 18a. Accordingly, the only proper inquiry was the scope of the "express preemption" provisions. *Id.* at 10a-11a, 19a-20a.

With respect to the text of the Safety Act, then, the panel did not dispute that the preemption provision of the Act (Section 1392(d)), read by itself, would preclude state common-law standards differing from federal

regulatory standards.[8] The court concluded, however, that because of the "savings clause" in a separate provision of the Safety Act, 15 U.S.C. § 1397(k), a different result was required. That provision, the court held, preserved common law claims against preemption even if, as here, they would conflict with a federal determination and thus be invalid under traditional conflict-preemption principles. Pet. App. 24a; *see also id.* at 20a-22a.

Judge Hill dissented, explaining (Pet. App. 33a (footnote omitted)):

> [T]he effect of a prevailing claim of common law negligence for failure to equip the trucks with antilock brakes would be the same as if the State of Georgia enacted a statute saying that a manufacturer cannot sell for use in Georgia any truck without antilock brakes. As noted above, Standard 121 expressly permits manufacturers to install airbrake systems on trucks and trailers. If the Supremacy Clause means anything, it must mean that federal law prevails in this conflict.

The Eleventh Circuit subsequently denied rehearing (Pet. App. 48a-49a), but it stayed the issuance of the mandate to permit Freightliner and Navistar to file a petition for certiorari (*id.* at 50a-51a). This Court granted the petition on October 7, 1994.

SUMMARY OF ARGUMENT

The Eleventh Circuit held that the state common law of torts, even when it conflicts with federal law in the ordinary conflict-preemption sense, is nonetheless immune from preemption under the Safety Act. The court based

[8] This Court recently made precisely this point with respect to a preemption provision that, without specific mention of "common law," covered any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434. The Court said: "Legal duties imposed on railroads by the common law fall within the scope of these broad phrases." *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) (citing to *Cipollone*).

that ruling, first, on a novel view of the law of preemption and, second, on a novel reading of the Safety Act. Both aspects of the Eleventh Circuit's ruling are incorrect.

I. The court first erred in concluding that an express preemption provision in a statute presumptively, indeed all but automatically, eliminates conflict preemption. It makes no sense, practical or constitutional, to attribute to Congress the intent to grant blanket authority to States to defeat Congress's own substantive regulatory policies simply because it has addressed itself to the subject of state authority and specified one area in which federal law is to be exclusive. Indeed, the well-settled and repeatedly reaffirmed precedent of this Court is directly to the contrary: even a sweeping savings clause, in which Congress explicitly seeks to preserve state authority, is read *not* to authorize state-law measures that would be invalid under ordinary conflict preemption analysis. *See, e.g., Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992); *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). If conflict preemption survives the existence of a broad antipreemption clause absent clear congressional statement, it surely survives the existence of a preemption clause.

Cipollone did not, in one brief passage (112 S. Ct. at 2618), overturn this established and common-sense result. Nothing in the passage indicates that a preemption provision is ordinarily a "reliable indicium" of congressional intent to authorize state law that conflicts with federal law. Indeed, the passage plainly addresses only implied *field* preemption, rather than conflict preemption, saying that the outer limits of affirmative congressional intent to displace state authority ordinarily must be found in the express statutory provision addressed to that issue —which was the "familiar" point made in the two decisions the Court relied on. *Ibid.* (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978), and *California Federal Savings & Loan Assn. v. Guerra*, 479

U.S. 272, 282 (1987)). That point, however, does not apply to conflict preemption, which does not depend on any affirmative congressional intent to displace state authority, but only on valid federal regulatory policy and the direct operation of the Supremacy Clause. The Eleventh Circuit's contrary reading of *Cipollone*, moreover, not only requires the surprising result that the Court meant to revolutionize preemption law without saying so, but is incompatible with the contemporaneous views of Justices who joined the *Cipollone* opinion (*see Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383 (1992) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Scalia, J.)) as well as with the Court's decisions both immediately before *Cipollone* (*see Morales, supra*) and after *Cipollone* (*see CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732 (1993); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993)).

II. The Eleventh Circuit, having misunderstood *Cipollone* and its effect on preemption law, also misconstrued the Safety Act. That Act does not achieve the extraordinary, if not unprecedented, result of authorizing state-law defeat of substantive federal regulatory determinations. That is enough for conflict preemption in this case, but in fact the Act goes further: state-law claims inconsistent with federal determinations under the Safety Act are expressly preempted.

The preemption provision, Section 1392(d), preempts state-law "safety standards." As this Court's decisions in *Cipollone* and *CSX v. Easterwood* make unmistakably clear, that language readily encompasses state tort-law product-safety standards, whether established by the common law or by statute (here both). Any other reading, moreover, would fly in the face of the purpose of the preemption provision: to produce a uniform standard where NHTSA acts. Tort-law requirements enforced through damages actions can powerfully defeat the policy

of uniformity. *See Cipollone*, 112 S. Ct. at 2620; *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). Standing by itself, then, Section 1392(d) preempts state tort-law claims like those brought by respondents.

In any event, whatever the meaning of Section 1392(d), the Eleventh Circuit's ouster of conflict preemption would require that Section 1397(k), the "savings clause," be read to preserve state common law that conflicts with federal standards. The provision cannot properly be so read. Its language declaring that "compliance" with federal standards is not a basis for an "exempt[ion]" from common-law duties does not speak to the situation where state-law duties are invalidated by, because they would defeat, federal law. Certainly the language offers no more ground for eliminating conflict preemption—and thus declaring States free to use their common law to undermine federal law—than did the sweeping antipreemption language found insufficient for that purpose in *Morales, Abilene Cotton*, and similar cases. Indeed, the Eleventh Circuit's blinkered view of Section 1397(k) would produce a senseless distinction between tort law codified in state statutes, as is now common, and tort law declared only in "common law."

Finally, neither the legislative history of the Safety Act nor established precedent supplies what the statutory text does not: a congressional authorization for States to use their common law to defeat federal standards. The pertinent congressional statements suggest, at most, a preservation of state common-law standards that in appropriate cases go beyond, rather than conflict with, federal standards. And that construction is, in fact, the long-expressed view of the courts on the subject. In particular, prior to the Eleventh Circuit decision in this case, the federal courts of appeals had uniformly held that the Safety Act does not oust conflict preemption, a position endorsed by the Solicitor General and accepted by Con-

gress in legislation enacted in 1991. This Court should reestablish that position as the governing law by reversing the Eleventh Circuit judgment in this case.

ARGUMENT

To prevail on their claims, respondents must obtain a determination under Georgia law that it was unreasonable in and of itself for petitioners not to have installed antilock brakes on their trucks when they were built in the 1980s.[9] Standard 121, however, embodies a determination under federal law—one, indeed, that was *mandated* by the comprehensive agency record, as the Ninth Circuit held in *Paccar*—that the omission of antilock brakes from trucks is *not* unreasonable, but that, to the contrary, *requiring* such brakes would itself present an unreasonable risk to safety, in contravention of the Safety Act. The requested state-law determination and the established federal-law determination are thus unavoidably in conflict. And if the federal law prevails, as it would under ordinary conflict-preemption principles, Georgia law may not declare petitioners' conduct in this respect negligent or their trucks defective as a basis for liability.

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[9] Respondents' claims allege negligence under the common law and "strict liability" under a Georgia statute, O.C.G.A. § 51-1-11. The two claims, however, amount to the same thing: the strict-liability standard does not impose liability "merely because a product may be dangerous" but, rather, like the negligence standard, requires proof that it was unreasonable for petitioners to omit antilock brake systems from their trucks. *See, e.g., Center Chemical Co. v. Parzini*, 218 S.E.2d 580, 581-82 (Ga. Ct. App. 1975); *Hunt v. Harley-Davidson Motor Co.*, 248 S.E.2d 15, 16-17 (Ga. Ct. App. 1978) ("reasonable care"). *See also Coast Catamaran Corp. v. Mann*, 321 S.E.2d 353, 357 (Ga. Ct. App. 1984), *aff'd*, 326 S.E.2d 436 (Ga. 1985) ("only semantics distinguishes the cause of action for negligence and a cause of action pursuant to OCGA § 51-1-11"); *Orkin Exterminating Co. v. Dawn Food Products*, 366 S.E.2d 792, 793-94 (Ga. Ct. App. 1988). Thus, the district courts and the Eleventh Circuit properly recognized that respondents have essentially one claim.

The Eleventh Circuit, like the district courts (Pet. App. 41a, 47a), accepted all of this. Indeed, the Eleventh Circuit agreed that the pertinent federal law deliberately afforded truck manufacturers an option to install or to omit antilock brake systems and that respondents' claims in these cases conflicted with that federal law by imposing a Georgia-law requirement that such brakes must be installed. Pet. App. 10a ("the claims [are] premised on a failure of the manufacturers to install specific safety devices in their vehicles, and . . . a safety standard established under the Act effectively [gives] the manufacturers the option of not installing the device"). Accordingly, the Eleventh Circuit (along with the district courts) did not doubt that respondents' claims are preempted *if* conflict preemption is available.

The Eleventh Circuit nevertheless held, based entirely on a brief passage in *Cipollone*, that conflict preemption was precluded by the presence of provisions in the Safety Act addressed to the scope of state authority. That holding is incorrect as an interpretation of the law of preemption and of *Cipollone*. It is also incorrect as an interpretation of the Safety Act, which, properly read, expressly preempts the state-law requirements invoked here by respondents.

I. EXPRESS PROVISIONS ON PREEMPTION DO NOT, OF THEIR OWN FORCE OR PRESUMPTIVELY, ELIMINATE CONFLICT PREEMPTION BEYOND THEIR EXPRESS TERMS.

The Eleventh Circuit's ruling fundamentally confuses two distinct sources of federal invalidation of state law. Conflict preemption follows from substantive federal regulatory action, "by direct operation of the Supremacy Clause" (*Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984)). Where state law conflicts with the federal policy, the state law is invalid, and no express or implied congres-

sional intent with respect to *state authority* is required. Express and implied field preemption, by contrast, are found when a statute, expressly or implicitly, addresses the issue of state authority and prescribes an area in which States are forbidden to act. Both explicit and implicit field preemption rest on discerned congressional intent to displace state authority altogether and attain exclusive federal authority in a defined area; once that definition is applied, there is no occasion for an independent inquiry (typically no occasion for inquiry at all) into whether a particular state action would contradict or serve to supplement substantive federal regulatory policy. *See, e.g., Wisconsin Dep't of Ind., Labor & Hum. Rel'ns v. Gould Inc.*, 475 U.S. 282 (1986) (labor); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (ERISA).

This Court summarized the standard categories of preemption analysis in *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). There are two forms of "field" preemption: "Congress' intent to supplant state authority in a particular field may be expressed in the terms of the statute"; or "Congress' intent to supersede state law in a given area may nonetheless be implicit" in a statutory scheme (if it is sufficiently pervasive, dominantly federal, or obviously demanding of uniformity). *Id.* at 2481-82. Conflict preemption, by contrast, stands quite apart from any congressional intent to displace state authority: "Even when Congress has not chosen to occupy a particular field, pre-emption may occur to the extent that state and federal law actually conflict"—because state law either makes compliance with federal law a " 'physical impossibility' " or stands as an " 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* at 2482 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941)). Although conflict preemption is of course grounded in congressional intent, the relevant intent is the intent defining the sub-

stance of the federal regulatory policy, not an intent to displace and preempt state authority. *See also, e.g., English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990); *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).[10]

There is simply no sound reason why the presence of an express preemption provision should foreclose, even presumptively, attention to actual conflicts between a federal substantive regulatory provision and conflicting state regulation. Indeed, the Court's precedents are exactly to the contrary, requiring clear statement before a statutory reference to state authority will be construed to authorize impairment of substantive federal policy. *Cipollone* did not alter that precedent or sensible principle.

A. Conflict Preemption, Based on Federal Regulatory Action, Is Not Ousted, Absent Clear Statement, by Express Provisions Addressing State Authority.

The Eleventh Circuit's ruling that an express preemption provision all but automatically ousts conflict preemption can be restated in more familiar, concrete terms: once Congress addresses the scope of state authority in a specific preemption provision, it is to be *presumed* to be licensing States to defeat federal law to whatever extent the preemption provision does not itself preclude the state action.[11] That extraordinary proposition is unreasonable

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[10] These principles apply equally to any properly authorized federal law (all of which is covered by the Supremacy Clause), including agency action. *See, e.g., City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368 (1986). Of course, an agency rule that is the only legally permissible choice on a full record has at least as much regulatory force, defining the substance of federal law for preemption and other purposes, as a rule adopted by an agency as a matter of discretion.

[11] The Eleventh Circuit stated that its principle depended on the preemption provision being a "reliable indicium" of congressional intent, but it declared that condition "not much of a hurdle." Pet. App. 18a. Under the Eleventh Circuit's decision, then, the ouster

on its face. For example, if a federal statute required a warning label on a product and then, in a separate preemption provision, declared simply that no State shall require any additional warning, the Eleventh Circuit's ruling would presumptively permit a State to *prohibit* the federally mandated warning—notwithstanding the bald conflict with the substantive federal warning requirement.[12] That approach makes no sense as an operative rule for construing presumed congressional intent. To the contrary, it would produce the topsy-turvy consequence that Congress could often produce a greater degree of protection of federal policy by omitting a preemption provision than by including one.

As a practical matter, the Eleventh Circuit's presumption makes no sense even as a "default rule" about what Congress intends. For one thing, when Congress writes a preemption provision to wall off a defined field from state action, it is necessarily focused on the need for uniformity under federal authority in the area. It is not only unwarranted but positively perverse to presume that Congress, by the very act of insisting not just on primacy but on exclusivity of federal authority in that area, is actually licensing defeat of federal authority in other areas. Moreover, the task that the Eleventh Circuit would impose on Congress is surely an unrealistic one: whenever Congress considers addressing *any* aspect of the scope of state authority in a statute, it would be obliged (because presumed) to survey all possible state actions that might have an impact on the federal program and attempt compre-

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of conflict preemption is certainly presumptive; indeed, it is all but automatic.

[12] This would have been the result in *Cipollone* itself, at least under the 1965 statute at issue, which required a warning on the cigarette package and barred States from requiring any other warning on the package (or in advertising). 112 S. Ct. at 2616. Yet it is absurd to suppose that Congress was licensing States to override the federal command to adopt that warning label. (The same result might follow under the 1969 (and current) statute.)

hensively to deal with that universe of potential impairments, on pain of being understood by the courts to have authorized any state action that it omitted from its preemption provision. Congress cannot reasonably be saddled with the impossible task of foreseeing all possible future state action that might frustrate the policies embodied in the federal statute, or the policies validly adopted in administrative proceedings conducted pursuant to authority delegated under a statute.[13]

A presumption directly contrary to that adopted by the Eleventh Circuit not only accords with common sense but is grounded in the Constitution: Congress must be assumed *not* to intend to allow state law to defeat federal policy. This principle, in fact, is nothing more than the natural corollary of the "assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). "This assumption provides assurance that 'the federal-state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). If the constitutional assumption is that Congress does not displace States in *their* proper sphere, the equally strong and complementary constitutional assumption, based directly on the Supremacy Clause, is that States are not permitted to displace federal action in *its* proper sphere. This assumption, too, "provides assurance that 'the federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Ibid.*

Indeed, this rule reflects—whereas the Eleventh Circuit's rule turns upside down—the traditional relation of

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[13] Congress might avoid the burden, of course, by including in every statute a provision stating that inconsistent state law is preempted. But it is senseless to impose on Congress the duty to restate the Supremacy Clause in every statute. And even the Eleventh Circuit, which thought that *Cipollone* announced a *new* principle of preemption law, could not attribute any awareness of such a duty to prior Congresses.

express preemption and conflict preemption. Conflict preemption follows directly from the constitutional command of the Supremacy Clause that valid federal laws directly regulating some activity pursuant to an Article I grant of power prevail over contrary state laws; and this form of federal supremacy has been established since the earliest days of constitutional law. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). It is express preemption—the ouster of state authority to act even when not inconsistent with directly applicable federal substantive law—that is more of a latecomer to our constitutional jurisprudence and makes a greater claim of congressional authority under the Constitution: it requires reliance on the necessary and proper clause to allow Congress to go beyond direct regulation of the object of its Article I powers and to displace even consistent state law that would not be invalid by virtue of the Supremacy Clause alone. It would accordingly be perverse to accord such primacy to express preemption as to find in the very enactment of a provision seeking to displace some aspect of state authority a reason for inferring a broad congressional abrogation of the command of the Supremacy Clause.

Not surprisingly, the established precedent of this Court is squarely contrary to the principle announced by the Eleventh Circuit. Thus, this Court has often indicated that conflict preemption may be considered in addition to express preemption. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-43 (1990); *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-43 (1977); *Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 509-22 (1989). Indeed, the Eleventh Circuit effectively acknowledged that this was the established law before *Cipollone*. Pet. App. 5a-11a.

Most pointedly, it has long been clear that when Congress addresses the question of state authority through a broadly worded savings clause, it is *not*, absent clear statement, to be inferred that Congress has allowed States to contradict its regulatory policies. The Third Circuit explained in an airbags case under the Safety Act (*Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1125, *cert. denied*, 498 U.S. 853 (1990)): "it is well-established that a savings clause like § 1397(k) does not 'save' common law actions that would subvert a federal statutory or regulatory scheme." *See International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). At least twice in recent years, this Court has reconfirmed this rule for construing even the broadest provisions addressing the scope of state authority: a clear statement is required before such provisions are read to authorize state laws in conflict with federal law. *See Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993).

If a broad savings clause that *explicitly* and sweepingly preserves state authority will not ordinarily be read to oust conflict preemption and thus does not preserve conflicting state laws, the same principle applies *a fortiori* to an affirmative preemption provision. After all, such a preemption provision at best speaks to preserving state law only by negative implication—in the Eleventh Circuit's view, by implication preserving all that is not included in the express provision. The long-established application of conflict preemption to state laws even when they are within the terms of an express *anti*preemption clause necessarily means that the existence of an express preemption provision does not, absent clear statement, eliminate conflict preemption.[14]

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[14] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), which respondents have relied on (Br. in Opp. 17 n.7), does not stand for a different rule. The preemption at issue there was a form of

B. *Cipollone* Did Not Alter This Fundamental Principle.

The Eleventh Circuit did not question that the foregoing was the well-established law prior to 1992. It held, however, that *Cipollone* radically altered preemption law, and changed these fundamental, common-sense principles, when the Court said:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S. [497, 505 (1978)], "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

112 S. Ct. at 2618. The Eleventh Circuit's reading of this passage cannot be right.

To begin with, the passage by its terms states a precondition to any restriction on implied preemption: the

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field preemption: the state-law safety duty invoked did not conflict with any substantive federal duty (*id.* at 257); thus, the sole issue was whether state authority was improperly trenching on an area within which federal *authority* was exclusive. In that context, the Court indicated a reluctance to infer that Congress had eliminated state-law remedies "for those injured by *illegal* conduct." *Id.* at 251 (emphasis added). But in cases of conflict preemption, as here, federal law *invalidates* the standard of conduct that defines the alleged "illegality," leaving the plaintiff with a complaint seeking recovery for conduct that is not tortious. In our legal system, it is the *imposition* of liability for non-tortious conduct, not its displacement, that would be extraordinary.

express preemption provision must be a " 'reliable indicium' " of Congress's intent on the issue of "state authority." The *Cipollone* passage says nothing about when that precondition is satisfied. Of course, to sustain the Eleventh Circuit's extraordinary conclusion, the needed congressional intent would have to reach the full range of possible state authority, including state action that undermines federal policy. But nothing in *Cipollone* says that a preemption provision provides even presumptively a reliable indicium of congressional intent to allow state law to defeat federal objectives. The contrary presumption is far more plausible, as the D.C. Circuit recently explained: "Where a state statute actually frustrates the purpose of Congress, we do not believe that the specific preemption clauses in a statute alone provide a 'reliable indicium of congressional intent with respect to state authority.' " *Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 581 n.12 (D.C. Cir. 1994) (quoting *Cipollone*).

It is, in any event, plain on the face of the passage quoted from *Cipollone*, with its reference to " 'intent with respect to state authority,' " that what the Court was discussing was the relationship between express and implied *field* preemption, not conflict preemption. The Court was doing no more than indicating the rarity with which congressional intent to preclude States from acting in an entire area of regulation may be found *implicit* in a statute that contains a more limited express provision addressing that very question. That is why the Court could say that the principle it was articulating was a "familiar" one. The *expressio unius* principle that the Court said it was applying does, of course, restrict the freedom to find an implied congressional intent on an issue—the general displacement of state authority in an area of law—in the face of an explicit (and limited) congressional statement on that very issue. But that interpretive principle has little to say, as a logical matter, about the relationship between a congressional statement of

preemptive intent (displacing general state lawmaking authority in an area) and preemption based on *regulatory* intent, which follows directly from the Supremacy Clause's mandate regarding the primacy of substantive federal regulatory policy (without separate proof of congressional intent to displace state authority).

The two precedents cited by the Court confirm that the passage in *Cipollone* addressed only the relationship between express and implied *field* preemption. *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), involved only a question of field preemption: whether a state law regulating certain pension plans was preempted by the exclusive federal authority over collective bargaining under the National Labor Relations Act. There was no claim of state-law conflict with any substantive federal regulation. Similarly, the passage from *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987), that the Court quoted in *Cipollone* is addressed to an express (anti)preemption provision that by its terms is about field preemption. 479 U.S. at 282 (quoting 42 U.S.C. § 2000h-4 ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field . . . .")). And the Court in *Guerra* held that there was in fact no conflict between the state and federal policies at issue. *Id.* at 284-91. The Court in *Cipollone* thus relied on these authorities for the only proposition they established: that implied *field* preemption is disfavored in the presence of an express provision addressing the field of permissible state authority.

Indeed, the *Cipollone* passage could not possibly have been speaking to the separate issue of conflict preemption. The Court had no occasion to consider any conflicts with substantive federal policy, because none of the claims that the Court found to be outside the scope of the express preemption provision presented such a conflict. The duties to abide by warranties and not to commit

deception, which survived express preemption, did not conflict with any federal policy. And while the asserted state-law duty to provide additional warnings, over and above the federally mandated warnings, raised an issue of conflict—on the theory that additional state-mandated warnings would have impaired Congress's determination that the simple and clear federally mandated warnings were most effective—that issue was removed from the case by the Court's holding that the failure-to-warn claims were preempted under the express preemption provision. 112 S. Ct. at 2621-25. In short, there was no conflict-preemption issue left in the case after the express-preemption issue was decided.

Even aside from what *Cipollone* said and what the case involved, there are compelling reasons to reject the Eleventh Circuit's view that the passage quoted above revolutionized preemption law. For one thing, nothing in the *Cipollone* passage hints that it is repudiating clear and repeatedly relied-on preemption principles. To the contrary, the Court said that it was following a "familiar" principle. Moreover, three Justices who were necessary to form a majority for this portion of the opinion (Chief Justice Rehnquist and Justices White and O'Connor) only one week earlier had specifically taken the very approach that the Eleventh Circuit found forbidden by *Cipollone*, concluding that a statute containing an express preemption provision "impliedly pre-empted" state law that was "in conflict with the full purposes and objectives" of the federal statute. *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383 (1992) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Scalia, J.). It cannot sensibly be assumed that these Justices meant in *Cipollone* to reject their own approach from the week before.

Finally, the Eleventh Circuit's reading of *Cipollone* is at odds with contemporaneous and subsequent decisions of the Court. Three weeks before *Cipollone* was

decided, the Court followed the established *Abilene Cotton* approach to savings clauses—strongly presuming continued applicability of conflict preemption—in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992). The Term after *Cipollone* was decided, the Court made clear in *CSX v. Easterwood* that the "plain wording" of a preemption clause was to be looked to "in the first instance" (113 S. Ct. at 1737), but not exclusively, and it entertained a "claim of implied 'conflict' preemption" on the merits, rejecting it *not* by declaring conflict preemption unavailable with a citation to *Cipollone*, but by referring to its substantive analysis of the federal policies on the subject. *Id.* at 1742 n.12.[15] Similarly, last Term, in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993), the Court reaffirmed the applicability of traditional "conflict" preemption analysis under ERISA, which contains a broad express preemption provision and a broad savings clause (for insurance laws), holding that the savings clause does *not* save state laws that would violate the Supremacy Clause under ordinary conflict preemption principles. "[W]e discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but 'where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs." *Id.* at 526.

In sum, the Eleventh Circuit misread *Cipollone* and mistakenly held that the presence of express preemption provisions in a statute readily eliminates conflict preemption analysis.

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[15] Conflict preemption could not exist, of course, where there was no federal determination on the specific subject—as the Court found in rejecting express preemption for certain grade-crossing claims. 113 S. Ct. at 1736-38, 1742.

II. THE SAFETY ACT EXPRESSLY PREEMPTS, RATHER THAN SAVES, STATE TORT STANDARDS THAT CONFLICT WITH FEDERAL LAW.

Because Congress may authorize state-law impairment of federal policies, it is necessary to examine whether—as the Eleventh Circuit believed—Congress did so in the Safety Act. Whatever difficulties there are in defining the outer limits of preemption under Sections 1392(d) and 1397(k), straightforward analysis of those provisions makes clear that they do *not* preserve state-law obligations that would fall under conflict preemption. Indeed, state claims such as the courts below held to be involved here are plainly defeated as a matter of express preemption; they come within Section 1392(d)'s preemptive reach and are not saved by Section 1397(k).

At the outset we note that it might be possible to read the relevant provisions, in light of the statute's strong commitment to uniformity of standards once NHTSA has addressed a topic, as expressly preempting *any* state-law claim on a matter addressed by a federal safety standard where the state-law standard "is not identical to the Federal standard" (§ 1392(d)). In that view, the Act preempts even state common-law standards that go further than, rather than contradict, federal standards.[16] We did not make such an argument below, however, and we need not make it here: this case involves the clearer situation of a contradiction between a federal determination and respondents' state-law claims, and all the courts below so treated it. The Eleventh Circuit judgment should be

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[16] Section 1397(k) would, under this reading of the Act, perform the function of *confirming* what might be inferred from Section 1392(d) itself: that manufacturers who comply with all federal standards are not, for that reason, to be excused from residual, background state common-law liability in respect to matters the agency does not address. That is, the provision would explicitly establish the absence of any implied field preemption broader than the express field preemption laid down in Section 1392(d).

reversed on the ground that state-law claims in conflict with federal law are preempted.

A. Section 1392(d), an Express Preemption Provision, Covers State Tort-Law Standards.

The provision in the Safety Act specifically commanding preemption, Section 1392(d), readily covers common-law tort duties like those respondents seek to impose here. The critical term, "standard," is, of course, the normal term referring to the common-law duties imposed by tort law.[17] And this Court in *Cipollone*, construing the phrase "requirements or prohibitions," and in *CSX v. Easterwood*, construing the phrase "law, rule, regulation, order, or standard," readily concluded that common-law duties "fall within the scope of these broad phrases." *CSX*, 113 S. Ct. at 1737 (citing *Cipollone*, 112 S. Ct. at 2620). Where the common-law standards address product safety, then, they are "safety standards" in ordinary, accepted usage. *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-15 (1987). The language of Section 1392(d), broadly preempting state safety standards on matters addressed by a federal motor vehicle safety standard, thus readily encompasses legal duties imposed under state tort law.[18]

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[17] *See, e.g.*, W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on the Law of Torts* §§ 30, 75, 99 (5th ed. 1984); Restatement (Second) of Torts § 282 (1965); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 142; *Silkwood*, 464 U.S. at 250-51, 256; *id.* at 264-65 (Blackmun, J., dissenting); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 322-23 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964). *See also Ream Tool Co. v. Newton*, 433 S.E.2d 67, 71 (Ga. Ct. App. 1993), *cert. denied*, 1993 Ga. Lexis 967 (Oct. 12, 1993); *Dupree v. Keller Indus., Inc.*, 404 S.E.2d 291, 293-95 (Ga. Ct. App. 1991), *cert. denied*, 1991 Ga. Lexis 698 (May 15, 1991); *Honda Motor Co. v. Kimbrel*, 376 S.E.2d 379, 383-84 (Ga. Ct. App. 1988).

[18] The statutory definition of "motor vehicle safety standards" as being "minimum standard[s]" (15 U.S.C. § 1391(2)) means only that manufacturers are free to exceed them, not that States are free to go beyond them. Otherwise, the bar on States' adoption of any standard except an "identical" standard (§ 1392(d)) would be nonsense.

Respondents have suggested that Section 1392(d) must exclude common-law duties because it initially uses "standard" to refer to NHTSA's administrative standards and because it preempts standards of a "State or political subdivision." Br. in Opp. 17-18. These suggestions are illogical. NHTSA adopts administrative standards under the Act because those are the only kind, by definition, that an administrative agency can adopt; use of the term standard to *include* NHTSA's measures no more *excludes* state common-law standards from the term than it excludes state legislative enactments.[19] And the phrase "State or political subdivision" includes the judicial organs of state government, just as did the term "State" in *CSX v. Easterwood*.[20] The language of Section 1392(d) is calculated to embrace all state authorities. Its evident aim of asserting exclusive federal authority forecloses any narrower reading.

Moreover, by its terms, Section 1392 applies "whenever a Federal motor vehicle safety standard . . . is in effect" and the state law at issue addresses "the same aspect of performance" as that addressed by the federal standard. The preemption clause does not apply only

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[19] Indeed, in *CSX v. Easterwood*, the Secretary of Transportation was given authority to "prescribe, as necessary, appropriate rules, regulations, orders, and standards" for railroad safety (45 U.S.C. § 431(a)), and the Court held that imposition of a common-law duty came within the comparable phrase of the preemption provision, "law, rule, regulation, order, or standard" (45 U.S.C. § 434). 113 S. Ct. at 1736-37. The terms of the preemption provision were not deprived of their normal plain meaning because essentially identical terms were used in defining the Secretary's authority, which necessarily was limited to issuing administrative standards.

[20] *See New York Times Co. v. Sullivan*, 376 U.S. at 265 ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); *Ex parte Virginia*, 100 U.S. 339, 347 (1880) ("A State acts by its legislative, its executive, or its judicial authorities."); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (jury is "quintessential governmental body").

"to the extent" that a federal safety standard imposes specific affirmative "obligations" on specific types of vehicles or devices, while excluding from its reach those determinations expressed in terms of exceptions built into a safety standard.[21] Rather, a federal safety standard embodying a federal determination on an aspect of performance is covered by the preemption clause in both its affirmative obligations and its limitations and exceptions to those obligations insofar as together, by inclusion and exclusion, they express the full contours of the determination regarding vehicle safety. It is an accepted principle that a deliberate policy-based agency *failure* to regulate may have preemptive force: "The Court has previously recognized that 'where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their policy power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)). Giving full operative force to exceptions adopted on the merits and expressly set forth in the regulation is the natural construction by virtue of that principle.

The policy of Section 1392(d) confirms the meaning of the text. The exclusion of common-law standards from

[21] The contrary view would doubly violate the text. First, this view would replace the word "whenever" with the phrase "to the extent that"—in direct contravention of this Court's holding in *John Hancock* that, as a matter of unambiguous meaning, a statute applying "to the extent that" a particular circumstance is present does *not* mean the same thing as a statute applying "if" the circumstance is present. 114 S. Ct. at 531 (rejecting United States's argument). Second, this view would replace the term "standard" with the narrower term "obligation": "standard" necessarily refers both to where the obligations apply and where they do not apply, as long as that defined scope itself reflects a judgment on the merits.

the preemptive scope of the Act would be inconsistent with the preemption clause's purpose, obvious both on its face and from the legislative history. Congress envisioned that, once the federal agency rulemaking produced a judgment about a particular safety matter, the standards would be controlling nationwide. The national character of the motor vehicle industry made uniformity a practical necessity[22]; and the broad investigatory authority and obligations of NHTSA made it fair and practical to repose this preemptive authority in the agency.[23] This commitment to uniform criteria that would guide manufacturers, based on an expert federal agency's rulemaking, naturally embraces common-law liability on matters addressed by federal standards: it has long been recognized that such liability is designed to affect and does affect defendants' conduct (*Cipollone*, 112 S. Ct. at 2620, quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). If permitted in all the 50 States, such liability would be "fundamentally at odds with the goal of uniformity" embodied in the preemption provision (*Ingersoll-Rand*, 498 U.S. at 142). *See also International Paper v. Ouellette*, 479 U.S. at 496.[24]

[22] H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) (The Act was "intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards."); S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966) ("The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.")

[23] S. Rep. No. 1301, *supra*, at 9, 11; H.R. Rep. No. 1776, *supra*, at 21.

[24] There is one separate reference to "common law" in the congressional reports' discussion of *the preemption provision*, and it does not suggest exclusion of common-law standards from that provision. The Senate Report, after stressing the need for uniformity, notes that States may set more stringent standards for their own procurements and then explains: "Moreover, the Federal minimum safety standards need not be interpreted as restricting

Accordingly, if Section 1392(d) stood alone, this case would immediately be at an end. The preemption of common-law claims that address an aspect of performance addressed by a federal safety standard—as the Eleventh Circuit recognized respondents' claim does with respect to Standard 121—is clear on the face of Section 1392(d). And the language could not have a more restrictive meaning without undermining the expressed purpose of uniform regulation behind Congress's enactment of the language. The Eleventh Circuit's apparent ruling that Section 1392(d) does not embrace common-law duties is incorrect.

B. Section 1397(k) Does Not Save State Tort Standards that Conflict with Federal Law.

Section 1392(d), of course, does not stand alone in the Safety Act. Section 1397(k), too, has a direct bearing on the scope of state authority in the area. Whatever the full affirmative reach of Section 1397(k), however, it is clear that the provision *cannot* properly be construed to save state tort standards, like those in this case, that

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State common law *standards* of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, *supra*, at 12 (emphasis added). The use of the term "standard" in referring both to the federal standards and to common-law duties confirms the natural meaning of "standard" in Section 1392(d) as including common-law standards; so too does the very fact that the committee undertook to offer an explanation on the point.

Beyond that, the meaning of the explanation is less clear. The committee might be referring to the federal standards collectively and disclaiming preemption of the whole field of common-law duties, whether or not a specific federal standard addresses the matter at issue in a particular suit. Or, the committee might be referring to individual standards, in which case it is declaring that ouster of common-law duties depends on how particular standards are judicially "interpreted," so that compliance does not automatically constitute (is "not necessarily") a defense to common-law liability. In either event, the Safety Act would not save common-law standards that are in conflict with federal standards.

are inconsistent with federal standards. That conclusion leaves conflict preemption in full force, whether or not Section 1392(d) is read expressly to preempt common-law safety standards. If Section 1392(d) *is* so read, express preemption exists as well.

1. Nothing in the language of Section 1397(k) refers to tort duties that conflict with federal standards. To the contrary, in declaring that "compliance" with any federal standard does not "exempt" a manufacturer from any common-law liability, the provision says only that the mere fact of compliance with federal standards, by itself, does not grant a privilege of not answering to common-law standards. Conflict preemption of a state-law duty that contradicts a federal policy, however, is not readily described as granting an "exempt[ion]" based on "compliance" with a federal standard. Rather, the state-law standard is rendered invalid by its inconsistency with federal law. The language of Section 1397(k) thus does not support the extraordinary result of congressional preservation of state-law liability based on standards inconsistent with federal policies.

Moreover, regardless of how broadly it is read, the language of Section 1397(k) cannot be viewed as more preservative of inconsistent state law than the sweeping savings clauses that have been held, at least since *Abilene Cotton*, to be *in*sufficient to oust conflict preemption.[25] For example, in the Court's recent decision in *Morales*, the statute at issue contained no less sweeping "savings" language: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter

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[25] The savings clause at issue in *Abilene Cotton* provided: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." 204 U.S. at 446 ("the act cannot be held to destroy itself"). *See also Puritan Coal Mining, supra; Kalo Brick, supra.*

are in addition to such remedies." 49 U.S.C. App. § 1506 (1992). Yet the Court squarely held that such language did not authorize state actions that would defeat the policies of uniformity and deregulation embodied in the rest of the statute. 112 S. Ct. at 2037. "As in *International Paper Co. v. Ouellette*, 479 U.S. [at 494], 'we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause.'" *Id.* *See also John Hancock, supra; Puritan Coal Mining*, 237 U.S. at 129 ("That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute."). There is no basis for a different conclusion here.[26]

The text and the background rule of construction against which Congress enacted the Safety Act, in short, make clear that Congress did not intend the surprising, and surely rare (if not unprecedented), result that States would be licensed to defeat federal regulatory standards.[27] The good sense of this presumption is well illustrated by the consequences of accepting the Eleventh Circuit's contrary view of Section 1397(k): all specific design stand-

[26] The Court in *Morales* also observed that the general savings provision was not written with specific reference to the preemption provision: it predated enactment of the preemption provision. In this case, too, the savings provision, Section 1397(k), though enacted contemporaneously, is written with no specific reference to the preemption provision, which appears five sections earlier in the Act. In any event, the *Abilene Cotton* principle relied on by *Morales* stands independently of the additional ground cited by the Court in *Morales*. Indeed, it is at least as absurd to presume that a single Congress meant to defeat its own substantive objectives as to presume that one Congress meant its preemptive intent to be defeated by an earlier Congress's statutory savings provision.

[27] As noted above, *Silkwood* is not precedent for such a law because the case involved no conflict of state and federal regulatory standards. *See* note 14, *supra*. *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

ards, all federally approved options, and all determinations that a particular requirement would be affirmatively *dangerous* would have no preemptive effect on tort suits. Manufacturers could be held liable under state law even for doing precisely what the federal regulations *required* them to do.

This assertedly "literal" reading of Section 1397(k) would produce a senseless result in another way as well. Because the provision refers only to "common law," it would not on this hypothesis preserve damages actions based on statutory causes of action—such as the strict liability cause of action in this very case. *See* note 9, *supra*. With the proliferation of codifications of tort standards, a wooden "literal" reading of Section 1397(k) would conform to no plausible congressional policy.

Even respondents may have come to agree that Section 1397(k) does not, after all, save all common-law, or tort, actions. In their brief in opposition to certiorari, they appeared to acknowledge that the provision may not preserve state claims in cases of "direct, irreconcilable conflict." Br. in Opp. 16, 23. Once that concession is made, however, the supposed "plain meaning" reading of Section 1397(k) as ousting conflict preemption, and preserving all tort liability, collapses.[28]

[28] As to state tort standards that add to, without contradicting, federal standards on a subject, several aspects of the text of Section 1397(k) lend support to the notion that the provision was not withdrawing *any* of the preemption provided for in Section 1392(d): the provision's placement five sections after the preemption provision (*cf. CSX v. Easterwood*, 113 S. Ct. at 1738), in a section of the statute addressed to prohibitions on manufacturers and exemptions; its omission of any reference to the preemption provision; and its use of "compliance" language—suggesting contemplation of a "compliance with administrative regulations" tort defense (*see* Restatement (Second) of Torts § 288C (1965))—rather than the ordinary language of savings provisions, such as those found in Section 1392(d) itself ("Nothing in this section shall be construed . . ."), in *John Hancock* (similar), in *Morales* (quoted in text above), or in *Guerra* (similar). The

2. The legislative history cannot supply the needed support for an inference of congressional authorization of state-law defeat of federal policy: the history simply does not show that Congress meant to authorize the imposition of tort liability based on state standards that conflict with federal standards. To begin with, the Senate bill did not include Section 1397(k). The Senate Report's discussion of the preemption provision, moreover, does not state any intent to license States to impose common-law liability based on standards incompatible with federal standards. To the contrary, it is naturally read to call for a standard-specific inquiry that "interpret[s]" the federal standard to determine its compatibility with the asserted state standard. *See* note 24, *supra*.

The House added Section 1397(k)—enacted as Section 108(c) of the 1966 Act and originally codified at 15 U.S.C. § 1397(c). The House Report stated that "compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 1776, *supra*, at 24. At most, however, the committee's statement indicates an intent that state common law would be permitted to establish standards higher than, but not inconsistent with, federal standards. The passage could, in fact, be read as reaching no further than to deny that mere compliance with all NHTSA standards automatically would defeat

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early cases arising under the Safety Act (*see* notes 31-33, *infra*) indicate why Congress, having strongly declared a need for uniform national standards to be developed by an expert administrative agency, might have emphasized that, *until* there were such standards on a particular subject, the non-uniform, judicially developed standards of the tort system would continue in force. It is unclear how Section 1397(k)'s language disclaiming an "exempt[ion]" based on "compliance" with "any" standard, interpreted in this way, would differ from a disclaimer of preemption of liability based on state standards that merely go beyond an applicable federal safety standard.

comon-law duties, without speaking to whether common-law duties are preserved or displaced when they address a safety matter addressed by a specific federal standard.[29]

Although Section 1397(k) was added by the House to the legislation as proposed by the Senate, and then retained by the conference committee, the provision received no mention in the Conference Report. It is not discussed in the portion of the report on the preemption provision (H.R. Conf. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966)), and it is not mentioned in the portion describing the section on exemptions in which the provision appears (*id.* at 18). That omission is powerful evidence that the provision was not intended to undo a significant part of what the preemption provision did, much less to take the unusual step of authorizing state-law defeat of federal policy.

3. This reading of Section 1397(k) is confirmed by lower court precedent and congressional action. Prior to the Eleventh Circuit decision in this case, the law was clear and settled (even in the Eleventh Circuit) that Section 1397(k) did *not* mean that conflict preemption was unavailable to preempt common-law claims. Not a single one of the numerous decisions relied on by respondents as rejecting preemption (Br. in Opp. 11-12) involved a state-law claim that *conflicted* with a federal safety standard or held that such claims were preserved by Section 1397(k). Indeed, it is striking that only two or three of respondents' decisions appear squarely to *hold*

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[29] This latter interpretation is affirmatively suggested by the congressional testimony that respondents quote as stating "[t]he reason for the House of Representatives to add" Section 1397(k): "'[i]f the Government assumes the responsibility of safety design in our vehicles,'" manufacturers will defend against suits by asserting, "'Our product meets Government standards.'" Br. in Opp. 20.

Representative Dingell referred to the preservation of common-law remedies as part of his argument against an amendment to add criminal penalties. His comments say nothing about the merits of the common-law actions or, in particular, whether they would be defeated by the applicability of a specific federal safety standard or by a conflicting federal standard. 112 Cong. Rec. 19,663 (1966).

that there is no preemption of a state standard that goes beyond a specifically applicable federal safety standard (and no decision contains anything resembling a full consideration of the issue).[30] All of the rest involved pronouncements merely rejecting a broad "compliance" (field-preemption) defense, unrelated to any specific federal standard[31]; or, despite broader pronouncements, involved no indication that a specific federal standard in fact applied to the case[32]; or were not tort suits at all or otherwise presented no challenge to liability by a tort defendant.[33] None of respondents' precedents supports preservation of *inconsistent* state standards.

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[30] *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. Civ. App. 1974); *cf. Buccery v. General Motors Corp.*, 132 Cal. Rptr. 605 (Cal. Ct. App. 1976). In *Turner*, moreover, the argument that the court discusses appears to be only a field-preemption argument, although a federal standard seems to have been applicable. 514 S.W.2d at 505-06. In *Buccery*, the court proceeds on the assumption that no federal standard actually addressed the safety issue for the vehicles in question. 132 Cal. Rptr. at 609.

[31] *See Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976); *McMullen v. Volkswagen of America*, 545 P.2d 117 (Ore. 1976); *Arbet v. Gussarson*, 225 N.W.2d 431 (Wis. 1975); *Volkswagen of America, Inc. v. Young*, 321 A.2d 737 (Md. App. 1974).

[32] *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978); *Sours v. General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983); *Schwartz v. American Honda Motor Co.*, 710 F.2d 378 (7th Cir. 1983); *General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985); *Roberts v. May*, 583 P.2d 305 (Colo. App. 1978); *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978).

[33] *United States v. General Motors Corp.*, 518 F.2d 420 (D.C. Cir. 1975); *Chrysler v. DOT*, 472 F.2d 659 (6th Cir. 1972); *Lollie v. General Motors Corp.*, 407 So. 2d 613 (Fla. App. 1981), *petition denied*, 413 So. 2d 876 (Fla. 1982); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683 (Mass. 1976). In *Jackson v. Spagnola*, 503 A.2d 944 (Pa. Super. 1986), the only issue presented was the *plaintiff*'s objection to admission of compliance evidence.

In contrast, the First Circuit in *Wood v. General Motors Corp.*, 865 F.2d 395 (1988), *cert. denied*, 494 U.S. 1065 (1990), held that Section 1397(k) did not prevent a finding of conflict preemption as to state common law. The *Wood* decision was followed by the Tenth Circuit in *Kitts v. General Motors Corp.*, 875 F.2d 787 (1989), *cert. denied*, 494 U.S. 1065 (1990). The Third Circuit reached the same conclusion in *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, *cert. denied*, 498 U.S. 853 (1990), explaining in particular that "a savings clause like § 1397 (k) does not 'save' common law actions that would subvert a federal statutory or regulatory scheme." *Id.* at 1125. And the Eleventh Circuit in *Taylor v. General Motors Corp.*, 875 F.2d 816 (1989), *cert. denied*, 494 U.S. 1065 (1990), so held as well. This uniform precedent that Section 1397(k) does not foreclose conflict preemption, moreover, was endorsed to this Court by the Solicitor General in a brief for the United States (signed as well by NHTSA) in *Wood*, supporting conflict preemption as to the tort law there at issue and explaining that "Section 108(c) [Section 1397(k)] does not preserve all design defect claims." 89-46 Br. for the United States 11.

The construction of Section 1397(k) was thus well settled by 1991. In that year, Congress enacted legislation directing NHTSA to require airbags in all new motor vehicles in the near future. 15 U.S.C. § 1392 Note (Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086). Congress was apprised of the unbroken *Wood* line of cases holding common-law liability for failure to install airbags to be preempted. *See* H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991) (referring to NHTSA letter). Yet, in enacting the legislation, Congress specifically indicated that it did "not want by this section to change the law on liability as it existed prior to enactment." *Ibid.*

In sum, the "savings clause" does not override the clear command of the preemption provision as it applies to state-law duties inconsistent with federal law. The text of Section 1397(k), the established rule of construction

in this context, the legislative history, and the clear precedent and subsequent congressional acceptance—these make it impossible to read Section 1397(k) as supplying the necessary evidence of congressional intent to permit defeat of federal policy. Thus, the Safety Act does not negate conflict preemption. Rather, applying Section 1392(d), the Act expressly preempts conflicting state-law tort duties.

* * * *

The Ninth Circuit in *Paccar* explicitly held that the imposition of a standard requiring ABS for heavy trucks is unwarranted and dangerous. NHTSA accordingly exempted trucks from such a requirement. Recognizing that the combination of *Paccar* and NHTSA's present regulation represent a federal determination that trucks are exempt from any such requirement and that the application of Georgia law here is in direct conflict with that federal determination, the Eleventh Circuit nonetheless allowed Georgia to impose this requirement. The court did so because of its misunderstanding of general principles of preemption law and this Court's decision in *Cipollone*. The Eleventh Circuit was wrong, and its judgment that there is indeed a conflict here should have led it to affirm the district courts' dismissals of these actions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: November 16, 1994

STATUTORY APPENDIX

STATUTORY APPENDIX

Prior to its recent recodification, the National Traffic and Motor Vehicle Safety Act provided in pertinent part:

15 U.S.C. § 1391

As used in this subchapter—

(1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

15 U.S.C. § 1392

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

* * * *

(c) Each order establishing a Federal motor vehicle safety standard shall specify the date such standard is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date such order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

(e) The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

(f) In prescribing standards under this section, the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * * *

15 U.S.C. § 1397.

(k) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act, together with various other transportation statutes and all of Title 49, U.S. Code, "without substantive change." Pub. L. No. 103.272, 108 Stat. 745, 941. The new Code provisions in relevant part, are as follows:

49 U.S.C. § 30102. Definitions

(a) GENERAL DEFINITIONS.—In this chapter—

(8) "motor vehicle safety" means the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.

(9) "motor vehicle safety standard" means a minimum standard for motor vehicle or motor vehicle equipment performance.

49 U.S.C. § 30103. Relationship to other laws

* * * *

(b) PREEMPTION.—(1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * *

(e) COMMON LAW LIABILITY.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

* * * *

49 U.S.C. § 30111. Standards

(a) GENERAL REQUIREMENTS.—The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.

(b) CONSIDERATIONS AND CONSULTATION.—When prescribing a motor vehicle safety standard under this chapter, the Secretary shall—

(1) consider relevant available motor vehicle safety information;

(2) consult with the agency established under the Act of August 20, 1958 (Public Law 85-684, 72 Stat. 635), and other appropriate State or interstate authorities (including legislative committees);

(3) consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which the standard will carry out section 30101 of this title.

COUNTERSTATEMENT OF QUESTION PRESENTED

The National Highway Transportation Safety Administration ("NHTSA") has adopted a safety standard pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") that regulates truck air-brake systems generally, but does not impose any requirements upon truck manufacturers as to whether to equip their air-brake systems with antilock devices. The question presented is:

Whether the Safety Act preempts state common law tort actions based on certain manufacturers' alleged failure to equip their truck air-brake systems with antilock devices, notwithstanding the Safety Act's provision that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law," 15 U.S.C. § 1397(k), and notwithstanding the fact that tort judgments against the manufacturers would not conflict with the Safety Act or any aspect of the NHTSA standard regulating air-brake systems.

(i)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-286

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK AND EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

A. The State Law Tort Actions

1. *Ben Myrick and Emily Myrick v. Freightliner Corporation*

On February 6, 1989, a tractor-trailer manufactured in 1987 by petitioner Freightliner Corporation was traveling southbound on a wet highway in Morgan County, Georgia. The driver of the tractor-trailer applied the brakes because

of traffic ahead. The brakes locked and caused the trailer to jackknife into the path of a northbound tractor-trailer driven by respondent Ben Myrick. The impact tore the cab off Mr. Myrick's tractor-trailer and threw him from the vehicle. Mr. Myrick suffered head, abdominal, and spinal injuries; he is permanently paraplegic and brain damaged.

Mr. Myrick and his wife, Emily Myrick, brought a state law tort action against petitioner Freightliner Corporation. *See* Joint Appendix ("JA") 3-8.[1] The complaint alleged, in pertinent part, that the accident was caused by the failure of Freightliner to equip its tractor with antilock brakes, and that this failure rendered Freightliner subject both to strict liability and to liability for negligence. JA 4, 7. Mr. Myrick sought compensatory damages, and his wife sought damages for loss of consortium. JA 6-7.

2. *Lindsey v. Navistar International Transportation Corporation*

On September 5, 1989, a tractor-trailer manufactured in 1982 by International Harvester Company (now petitioner Navistar) was traveling southbound on a highway in Oconee County, Georgia. The driver of the tractor-trailer applied the brakes because a car had stopped in front of him. The brakes locked and caused the tractor to jackknife into the path of a northbound automobile driven by Mrs. Grace Lindsey. Mrs. Lindsey was killed.

Mrs. Lindsey's surviving spouse and the executor of her estate, Mr. Jack Lindsey, brought a state law tort action against International Harvester and Navistar. JA 9-12.[2]

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[1] The Myricks' tort action also named the manufacturer of the trailer, Freuhauf Corporation. Freuhauf was subsequently dismissed from the action by agreement of the parties. *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 3a n.1.

[2] International Harvester was subsequently dismissed from the case, leaving Navistar as the sole defendant.

The complaint alleged, in pertinent part, that the accident was caused by the failure of the manufacturer to equip the tractor with antilock brakes, a failure that rendered the defendants subject to design defect liability and liability for negligence. JA 10-11. The complaint sought both compensatory and punitive damages. JA 11-12.

3. *Proceedings Below*

Both the *Myrick* and *Lindsey* tort actions were removed to federal court on diversity grounds. In both cases, the federal district courts granted motions by the defendants for summary judgment and dismissed plaintiffs' tort claims on the ground that they were preempted by the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act" or "Act"). *See* Pet. App. 34a-45a (*Myrick*); Pet. App. 46a-47a (*Lindsey*). The Eleventh Circuit consolidated the two cases for purposes of appeal, and by a 2-1 panel decision reversed the district courts' conclusions that plaintiffs' tort claims were preempted by the Safety Act. *See* Pet. App. 1a-33a. Petitions for rehearing and rehearing *en banc* were denied, Pet. App. 48a-49a, and this Court granted a petition for writ of certiorari to review the Eleventh Circuit's decision.

B. The Federal Statutory Framework

1. Congress enacted the Safety Act in 1966 for one stated purpose: "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381.[3]

The Safety Act provides that the Secretary of Transportation—who acts through his or her delegee, the National Highway Transportation Safety Administration ("NHTSA")—"shall establish by order appropriate Fed-

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[3] Congress recodified the Safety Act in the summer of 1994 without substantive change. *See* Pub. L. No. 103-272, 108 Stat. 745. Because the pre-1994 version of the Act is at issue here, we cite the pre-1994 codification in this brief.

eral motor vehicle safety standards." 15 U.S.C. § 1392(a). The Act defines "[m]otor vehicle safety standards" to mean "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. § 1391(2).

Manufacturers must certify compliance with performance standards established by NHTSA in order to sell their vehicles and equipment, 15 U.S.C. §§ 1397(a)(1)(A), 1403, and are subject to civil penalties for the violation of NHTSA standards, 15 U.S.C. § 1398. The Act does not establish any mechanisms for compensating persons injured in traffic accidents.

2. The Safety Act contains both a preemption provision and a "savings" provision preserving common law liability. The preemption provision states:

> **Supremacy of federal standards; allowable higher standards for vehicles used by Federal or State governments.**
>
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard. [15 U.S.C. § 1392(d).]

The savings provision states:

> **Continuation of common law liability.**
>
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law. [15 U.S.C. § 1397(k).][4]

C. NHTSA Standard 121

1. Shortly after the Safety Act was passed, the Secretary's delegee prior to NHTSA—the Federal Highway Administration—published an Advance Notice of Proposed Rulemaking announcing an intention to promulgate a standard establishing requirements for various aspects of performance for air brakes—the type of brakes then, and now, commonly utilized in buses, trucks and trailers. *See* 32 Fed. Reg. 14,278, 14,279 (1967).

After a prolonged rulemaking proceeding described in some detail in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 636-38 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978) ("*Paccar*"), NHTSA adopted a final standard—denominated as Standard 121—applicable to air-brake systems in buses, trucks and trailers. *See* 39 Fed. Reg. 39,880, 39,881 (1974). At the time, Standard 121 required, *inter alia*, that trucks and trailers stop within specified distances and that the wheels of the vehicles not lock uncontrollably during those stops. *Id.* Although Standard 121 did not require that any particular technology be used to meet these performance requirements, most manufacturers notified NHTSA that a particular antilock device,

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[4] The above-quoted language—which is the operative language for this case—is the original language of both provisions as enacted in 1966, with the exception of the sentence in the preemption provision stating that "Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard." That sentence was added to the preemption provision in 1982. *See* Pub. L. No. 97-331, § 3, 96 Stat. 1619.

which had by then been developed, would be necessary to achieve compliance. *See Paccar,* 573 F.2d at 637.[5]

Within a year after Standard 121 took effect, NHTSA reported that the antilock systems in thousands of vehicles had worked without a single report of a safety related defect. 41 Fed. Reg. 8783, 8785 (1986). While some manufacturers reported that the antilock systems in their vehicles were not functioning properly, NHTSA found that this was due in large part to avoidable problems encountered by the manufacturers in attempting to mass produce antilock devices, and not to the lack of available technology. *Id.; see also id.* at 8786 (although some vehicles produced to comply with Standard 121 "demonstrate[d] unsatisfactory handling characteristics [, t]he source of the problem is not technological infeasibility of producing vehicles with desirable handling characteristics").[6]

2. In January 1975, Paccar (a truck manufacturer) and two trade associations filed a petition in the Ninth Circuit for judicial review of Standard 121. *Paccar*, 573 F.2d 632. The petitioners in *Paccar* argued that the statutory prerequisites for issuance of the performance requirements in Standard 121 that effectively required antilock devices had not been satisfied because, *inter alia*, (1) NHTSA had failed to demonstrate a need to improve the

[5] As described by the *Paccar* court, an antilock device consists of a minicomputer attached to each axle of a truck or trailer that "senses" when a wheel begins to lock and momentarily releases the brake to regain traction. *Paccar,* 573 F.2d at 637.

[6] Although NHTSA thus concluded that Standard 121 was "practicable" as written, the agency eased the stopping distance requirements in order to "improve handling characteristics while design problems are being resolved by the manufacturers." 41 Fed. Reg. at 8786. At the same time, based on the performance history of vehicles manufactured to comply with Standard 121, NHTSA refused to eliminate the "no lockup" requirement and reiterated "its conviction that antilock is sufficiently reliable to justify its continued installation in satisfaction of the standard's requirements for directional stability." *Id.* at 8787.

safety performance of air-braked vehicles; and (2) antilock devices were unreliable and actually rendered vehicles potentially more dangerous than they would be without such devices. *Id.* at 639.

The *Paccar* court rejected the first argument, finding that, in view of the extensive record demonstrating that greater braking stability would improve highway safety, "NHTSA was justified in promulgating a Standard requiring improved air brake systems and stability mechanisms for the industry." *Id.* at 640. The court found, however, that "because of unforeseen problems in the development of the new braking systems, the Standard was neither reasonable nor practicable *at the time it was put into effect.*" *Id.* (emphasis added).[7] Thus, the *Paccar* court stated:

> [T]he comprehensive data before us indicate that there is a strong probability that the performance of a substantial number of vehicles whose braking systems have been altered to include "overpowered" front axles and antilock devices has created a potentially more hazardous highway situation than existed before the Standard became operative. [*Id.* at 643.]

Accordingly, the *Paccar* court concluded that "until such time as NHTSA develops evidence that the new braking systems required by the Standard do not create the possibility of greater danger to the public, those parts of the Standard requiring heavier axle and the antilock device should be suspended." *Id.* The court expressly limited its holding as follows:

> We hold only that more pro[b]ative and convincing data evidencing the reliability and safety of vehicles

[7] The court stated that while "[s]ome trucks were easily able to meet the stopping requirements of the Standard . . . critical problems began with mass production of vehicles designed to meet the Standard." 573 F.2d at 641. The court equated "stopping requirements" with "the antilock requirement." *Id.* at 639. NHTSA subsequently indicated that the court's locution in this regard was imprecise. 43 Fed. Reg. 48,646, 48,647 (1978).

> that are equipped with antilock and in use must be available before the agency can enforce a standard requiring its installation. [*Id.*]

3. After *Paccar*, NHTSA published an Advance Notice of Proposed Rulemaking seeking comments on, *inter alia*, issues left open by that decision. *See* 44 Fed. Reg. 9783 (1979). In the Notice, NHTSA stated that it had received "several inquiries from trucking companies asking if they are required to disconnect their antilock systems" in light of the *Paccar* decision. *Id.* at 9784. In response to these inquiries, NHTSA "recommend[ed] that antilock systems on existing vehicles be maintained in proper working condition, in order to achieve the benefits for which the systems were designed." *Id.* The agency went on to reject a request that it

> make a finding that all vehicles built to conform to the invalidated requirements contain a safety-related defect that justifies their recall. The NHTSA has conducted a vigorous campaign to insure that all defects that might arise in components installed to meet the standard are recalled and fixed before they cause any damage. This program has not uncovered evidence that the componentry installed contains inherent problems that create a hazard to the public. If it had, the agency would have taken action to recall all componentry earlier. [*Id.*]

Finally, NHTSA noted that even Paccar itself—the truck manufacturer that had successfully challenged Standard 121 before the Ninth Circuit—shared its view of the safety benefits of antilock systems: "[I]t is PACCAR's engineering judgment that the wheel lockup presents enough of a safety problem that the company continues to supply antilock on this axle although it believes the Ninth Circuit court ruling in fact relieves it of this obligation." *Id.* at 9785.

4. Six months later, NHTSA published amendments to Standard 121 to implement the *Paccar* decision. *See* 44 Fed. Reg. 46,849 (1979). NHTSA added language to the standard stating that the parts of the standard invalidated by *Paccar* "are not applicable to trucks and trailers." *See* 49 C.F.R. § 571.121 (S3). NHTSA explained:

> The regulation is being amended in this manner rather than deleting or revising the working of each of the affected sections in order to disturb the actual text of the standard as little as possible. In that way, the affected sections can most easily be reinstated when suitable solutions to the requirements laid down by the Court are found. In addition, by retaining the standard's language in its existing form, manufacturers are made aware of what the agency still considers to be reasonable standards for minimum acceptable performance, and those manufacturers that wish to construct their vehicles in accordance with the non-mandatory sections of the standard will have the necessary guidance to do so. [44 Fed. Reg. at 46,849.] [8]

5. Since 1979, NHTSA has taken no final regulatory action with respect to the "no lockup" performance requirement for trucks and trailers invalidated in *Paccar*.[9] Thus, at the time that the vehicles involved in the accidents at issue in *Myrick* and *Lindsey* were manufactured and sold (1987 and 1982 respectively), and at the time of the accidents themselves (1989), the federal regulations

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[8] *Paccar* left intact a provision in Standard 121 that contained two requirements for "a vehicle equipped with an antilock system." *See* 49 C.F.R. § 571.121 (S5.5). This provision was not altered in the 1979 amendments to Standard 121. Thus, truck and trailer manufacturers that elected to install antilock systems after the 1979 amendments remained under an obligation to conform those systems to the requirements of this provision.

[9] In 1990, NHTSA announced its intention to revisit the question of whether to require antilock systems in trucks and trailers. *See* 55 Fed. Reg. 44,848 (1990). And, in 1991, Congress directed NHTSA to initiate a rulemaking proceeding to examine the use of antilock systems, *see* P.L. No. 102-240, Title IV, § 4012, 105 Stat. 2157, which the agency did in 1992, *see* 57 Fed. Reg. 24,212 (1992). To date, NHTSA has not promulgated a final rule on the subject of antilock systems in trucks and trailers.

on the subject of air brakes in trucks and trailers remained as they were after NHTSA's adoption of the 1979 amendments to Standard 121.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. Myrick suffered grievous physical injuries and Mrs. Lindsey was killed as the result of accidents involving trucks manufactured by petitioners. Mr. Myrick and his wife and Mr. Lindsey brought tort suits against petitioners under the common law of Georgia to seek compensation for losses suffered from the accidents.

Georgia's ability to provide compensation to the victims of traffic accidents is at the core of the States' historic police powers. The Safety Act does not purport to displace this State function. The Act does not establish a federal scheme for compensating the victims of highway accidents. And, in sweeping terms, the Act states: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added).

The circumstances of this case provide not the slightest reason for seeking to circumvent the plain words of this savings provision. There is simply no conflict between the Safety Act and Standard 121, on the one hand, and the state tort claims brought by respondents, on the other. Standard 121 does not in any respect purport to preclude a truck manufacturer from installing antilock devices on its vehicles. As originally adopted, the "no lockup" requirement of Standard 121 effectively required installation of antilock devices. The amendment after *Paccar* declared that requirement "not applicable to trucks and trailers." Since this amendment, truck manufacturers have been free, as far as federal regulation is concerned, to install or not to install antilock devices, just as they were before Standard 121's original adoption. Indeed, if anything, Standard 121 as amended seems to encourage truck manufacturers favorably to consider utilizing antilock devices:

> [By] retaining the standard's language in its existing form, manufacturers are made aware of what the agency still considers to be reasonable standards for minimum acceptable performance, and those manufacturers that wish to construct their vehicles in accordance with the non-mandatory sections of the standard will have the necessary guidance to do so. [44 Fed. Reg. at 46,849.]

Thus, Standard 121 as amended contains no command as to whether truck manufacturers should install antilock devices. In these circumstances, a determination under Georgia tort law that petitioners' failure to install antilock devices was tortious would in no way conflict with any requirement or purpose of Standard 121.

The question here is whether, nevertheless, by virtue of Standard 121, the Safety Act precludes respondents from proving their claims under Georgia law and receiving the remedies that Georgia law provides. Such a result would be extraordinary given the powerful state interest on the one side and the absence of a federal interest on the other. And, as we show in this brief, the Safety Act does not call for any such result.

The beginning and the end of analysis as to whether a federal statute preempts state law is the determination as to whether Congress intended the statute to have that effect.[10] This determination of congressional intent is not

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[10] *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990) ("[T]he question whether a state action is preempted by federal law is one of congressional intent.") (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)); *Malone v. White Motor Co.*, 435 U.S. 497, 504 (1978) ("It is uncontested that whether the [state] statute is invalid under the Supremacy Clause depends on the intent of Congress."); *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947) ("The question in each case is what the purpose of Congress was."); *California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (plurality opinion) ("In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause

made in a vacuum. Rather, it is informed by presumptions derived from the basic principles of our federal system. Given the status of the States in that system, there is a general presumption against the conclusion that Congress intended a federal enactment to displace state law—a presumption that can be overcome only by a clear manifestation of congressional intent to the contrary.[11] This presumption is at its strongest when the question is, as here, whether Congress intended to prohibit the States from protecting the health and safety of their citizens through the exercise of such traditional and core police power functions as the provision of common law tort remedies.[12] In this connection, whether the federal statute provides "any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct"—as the statute here does not—is par-

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of the Constitution, our sole task is to ascertain the intent of Congress.").

[11] *See, e.g., Building & Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190, 1194, 1198 (1993) ("'Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'") (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) ("[T]he exercise of federal supremacy is not lightly to be presumed.") (internal quotations omitted); *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) ("[T]his Court has long insisted that an intention of Congress to exclude States from exerting their police power must be clearly manifested.") (internal quotations omitted).

[12] *See, e.g., Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2243 (1994); *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *see also Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 714-15 (1985) ("[T]he presumption [is] that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause . . . . [W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (internal

ticularly significant.[13] In the absence of such a substitute, plaintiffs who could prove that their physical injuries resulted from the tortious conduct of defendants under state law would be left wholly without any remedy—a result that should not readily be attributed to Congress.

Measured in this light, the Safety Act cannot be understood to evidence an intent by Congress that state law tort actions should be preempted in the circumstances presented here. Petitioners' argument to the contrary is premised on two alternative theories of preemption. First, petitioners argue that respondents' common law actions are expressly preempted under the provisions of the Safety Act that state the congressional determination with respect to preemption. Second, petitioners argue that, even if the express provisions do not preempt respondents' common law actions, the Safety Act impliedly preempts those actions because the relief sought by respondents would somehow be in conflict with Standard 121.

In part I, *infra*, we show that the two provisions of the Safety Act that expressly set forth Congress' determination with respect to preemption—the preemption provision (15 U.S.C. § 1392(d)) and the savings provision (15 U.S.C. § 1397(k))—do not preempt respondents' common law actions. Review of the language of the preemption provision, and the legislative history, demonstrates that the provision is intended to preempt state legislative or administrative safety standards that conflict with a federal safety standard, and not to preempt com-

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quotations omitted); *cf. BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994) ("To displace traditional State regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'") (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)).

[13] *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-64 (1954); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *Cipollone*, 112 S. Ct. at 2630-31 (Blackmun, J., joined by Kennedy, J. and Souter, J., concurring in part, concurring in the judgment in part, and dissenting in part).

mon law tort actions. In addition, the preemption provision does not in any event come into play where, as here, there is no federal safety standard regulating the "aspect of performance"—here wheel lockup during the braking process—that is at issue in the common law actions.

Even if, *arguendo*, the preemption provision were to apply here, respondents' common law actions would be preserved by the savings provision. That provision states in sweeping and unambiguous terms that "[c]ompliance with any . . . safety standard . . . does not exempt any person from any liability under common law." The plain terms of this provision leave no room for a conclusion that respondents' common law actions are expressly preempted by the Safety Act. And the legislative history confirms that Congress meant the savings provision to protect such common law actions from preemption.

In part II, *infra*, we show that there is no implied preemption here. First, petitioners' argument for implied preemption rests on an incorrect factual premise. There is no conflict between the federal safety standard here and the relief sought in respondents' common law actions. There is no federal safety standard that requires any truck manufacturer to install or not to install antilock devices. A common law judgment that petitioners' failure to install antilock devices on the particular trucks involved was tortious would not conflict with any federal requirement or objective.

Second, petitioners' argument for implied preemption rests on an incorrect legal premise. Congress has directly spoken to the precise question of preemption at issue here and has in express terms declared its intent not to preempt common law actions such as those here. Congress cannot be understood to have intended that courts would imply a congressional intent to preempt in the very circumstances in which Congress has expressly precluded preemption.

The preemption provision and the savings provision reflect Congress' effort to strike a balance between the federal interest in regulating motor vehicle safety and the States' interest in providing common law remedies for the victims of motor vehicle accidents. It is not for the courts to redraw that balance through the doctrine of implied preemption.

ARGUMENT

I. THE EXPRESS PROVISIONS OF THE SAFETY ACT DO NOT MANIFEST AN INTENT TO PREEMPT STATE TORT LAWS

The Safety Act contains two provisions that expressly address the extent to which the Act is intended to preempt state law: a provision stating the preemptive effect of the Act, 15 U.S.C. § 1392(d), and a savings provision captioned, in the codification of the Act, "[c]ontinuation of common law liability." 15 U.S.C. § 1397(k). The threshold question in this case is whether these provisions manifest an intention to preempt state tort law remedies in the circumstances presented here. We show in this part of the brief that these provisions cannot be read to effect such preemption.

A. The Language of the Preemption Provision

The preemption provision of the Act states in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no state . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any *safety standard* applicable to the *same aspect of performance* of such vehicle or item of equipment which is not identical to the Federal Standard. [15 U.S.C. § 1392(d) (emphasis added).]

In two respects this language indicates that preemption was not intended in the circumstances presented here.

1. *"Safety Standard"*

The preemption provision prohibits a State from establishing or continuing in effect a "safety standard" that conflicts with a "safety standard" established under the Act. While the term "safety standard" may not be wholly self-defining, in the context of its usage throughout the Act, it is strongly suggestive of an intention to preempt state legislative or administrative standards and not common law tort standards.

First, "safety standard" is the term used throughout the Act to refer to the administrative standards that the Secretary is authorized to adopt pursuant to the Act.[14] The use of the same term to refer to the state norms that may be displaced by a Federal "safety standard" is, under normal rules of statutory construction, indicative that the term is meant to have the same meaning.[15] Thus, the most natural reading of the provision is that a "safety standard" promulgated under the Act will preempt a state legislative or administrative "safety standard" that conflicts with the federal standard.

Second, while, as petitioners correctly point out, state tort law may have the effect of establishing substantive standards of conduct, "safety standard" is not the term Congress would likely have used to refer to the substantive consequences of state tort law. When Congress has expressly intended to preempt state tort law, Congress has used broader, less specific language than "safety standard." Thus, Congress could have easily used in place of, or in addition to, "safety standard," more general terms like "law," "common law," or "requirement."[16] Indeed, as we discuss below, Congress was conscious of the potential interplay between Safety Act standards and common law actions, and dealt expressly with that interplay in the savings provision. It is unlikely that Congress would have intended to address that interplay, with its profound implications for federalism (*see supra*, pp. 11-13), through the mere reference to the term "safety standard" in the preemption provision.

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[14] *See, e.g.*, 15 U.S.C. § 1392(e) ("[t]he Secretary may by order amend or revoke any [f]ederal motor vehicle safety standard . . ."); *id.* § 1392(h) ("[t]he Secretary shall issue initial [f]ederal motor vehicle safety standards . . ."); *id.* § 1392(i)(1)(A) ("the Secretary shall publish proposed [f]ederal motor vehicle safety standards . . ."); *id.* § 1392(i)(1)(B) ("the Secretary shall promulgate [f]ederal motor vehicle safety standards . . .").

[15] *See Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992) (it is a "basic cannon of statutory construction that identical terms within an Act bear the same meaning") (citing cases); *Morrison-Knudsen Constr. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983) ("a word is presumed to have the same meaning in all subsections of the same statute").

2. *"The Same Aspect of Performance"*

Even if, contrary to what we have just argued, the term "safety standard" were read to include common law tort duties, the preemption provision would not apply in the circumstances of this case.

The preemption provision is designed to ensure that a federal safety standard will displace a conflicting state

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[16] Petitioners cite a number of cases and authorities outside the preemption context that use the word "standard" to refer to common law tort duties, and one such case even using the term "safety standard" in this sense. Pet. Br. at 30 & n.17. But contrary to petitioners' suggestion, this Court has never had occasion to decide whether the term "safety standard," as used in a statutory preemption provision, is sufficient standing alone to effect the preemption of common law tort claims. In *CSX Transp. Inc. v. Easterwood*, the preemption provision found to embrace common law tort duties did use the word "standard," but the word "standard" appeared at the end of a string of broader terms—"laws, rule, regulation, order"—and the *CSX* Court did not indicate which of the various terms in the preemption provision it found to embrace common law tort duties. *See* 113 S. Ct. at 1737. And in *Cipollone v. Liggett Group, Inc.*, the words found by the Court to embrace common law tort duties were the words "requirement or prohibition . . . imposed under State law," not "safety standard." *See* 112 S. Ct. at 2619-20.

safety standard. The provision defines when such a conflict exists by use of the term "the same aspect of performance" of a motor vehicle or item of motor vehicle equipment. If a state safety standard does not impose a conflicting requirement on "the same aspect of performance," the preemption provision of the Act has no application to the state standard.

The "aspect of performance" at issue here is wheel lockup during the braking process. *See supra*, pp. 5-10. The net result of NHTSA's efforts to address the issue of wheel lockup is that Standard 121, as amended, does not regulate at all that "aspect of performance" of trucks and trailers. Indeed, Standard 121, as amended, expressly states that the requirements respecting wheel lockup applicable to other vehicles "are not applicable to trucks and trailers." 49 C.F.R. § 571.121 (S3).

Thus, this precondition for application of the preemption provision does not exist here. If there is no federal safety standard regulating an "aspect of performance," a state safety standard regulating that aspect of performance is outside the reach of the preemption provision.

It is, of course, possible to give the term "aspect of performance" a broader reading. For example, it could be argued that the "aspect of performance" regulated by Standard 121 is the entire braking system, so that any state safety standard regulating any aspect of the braking system would be regulating "the same aspect of performance." Such a reading would bring the preemption provision into play even when there is no conflict between the substantive requirements of the federal safety standard and the substantive requirements of the state safety standard. Such a reading would make the term "aspect of performance" nothing but words to be manipulated and would result in preemption well beyond what is required to accomplish the manifest objective of the preemption provision. That objective is apparent from the use of the

term "identical to the Federal standard" as the determinant for whether a state safety standard regulating "the same aspect of performance" is preempted. That determinant is a proxy for the concept of conflict. Here, there can be no conflict between federal and state requirements applicable to wheel lockup for the reasons we have already stated. Without such a conflict, the concern of the preemption provision simply is not implicated.[17]

B. The Language of the Savings Provision

Even if the Court were to conclude, contrary to our arguments, that the preemption provision applies in the circumstances presented here, the savings provision of the Safety Act would foreclose a finding of express preemption of respondents' common law tort claims.

The savings provision is stated in simple and straightforward terms: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added).

On its face, this provision is sweeping and unambiguous. "Compliance with any Federal . . . safety standard" is a phrase that does not admit of qualification. It cannot be read to mean only compliance with certain federal safety standards, or to except from its scope safety standards that deal with the particular question of design or performance at issue in a given common law action.

Similarly, the phrase "does not exempt any person from any liability under common law" does not on its

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[17] For the reasons stated in text, the appellate decisions on the subject hold that the term "aspect of performance" must be given a narrow reading consistent with its purposes. *See Wood v. General Motors Corp.*, 865 F.2d 395, 409 (1st Cir. 1988) (citing *Chrysler Corp. v. Rhodes*, 416 F.2d 319 (1st Cir. 1969)), *cert. denied*, 494 U.S. 1065 (1990); *Chrysler Corp. v. Tofany*, 419 F.2d 499, 509-10 (2d Cir. 1969). This issue was not addressed by the Eleventh Circuit below.

face admit of qualification. "[A]ny liability under common law" is all inclusive. That phrase cannot fairly be read to mean that the Safety Act provides any basis for exempting any defendant from any liability under common law. *See United States v. James*, 478 U.S. 597, 604 (1986) (the federal statute "outlines immunity in sweeping terms: 'No liability of *any* kind shall attach to or rest upon the United States for *any* damage from or by floods or flood waters at *any* place.' It is difficult to imagine broader language.") (emphasis by Court).

C. The Legislative History

The legislative history of the Safety Act confirms the conclusion—there is no express preemption—that flows from the plain language of the Act.

The Congress that enacted the Safety Act in 1966 was well aware of the existence of state common law design defect lawsuits of the type involved here. *See, e.g., Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1256-57 (1966) ("*House Hearings*") (testimony of Representative Charles P. Farnsley regarding design defect litigation involving the General Motor's Corvair); *id.* at 1315 (statement of Daniel P. Moynihan regarding the case of *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959)); *House Hearings* at 1351 (statement of Mr. Maurice A. Garbell concerning Corvair design defect litigation); *Hearings on S. 3005 Before the Senate Committee on Commerce*, 89th Cong., 2d Sess. 252 (1966) (testimony of Dr. Seymour Charles noting the pendency of 100 lawsuits challenging the safety design of the Corvair). *See also generally* Kurt B. Chadwill, *Automobile Passive Restraint Claims Post-Cipollone: An End To The Federal Preemption Defense*, 46 Baylor L. Rev. 141, 178 n.223 (1994).

In light of this knowledge, the Safety Act's preemption provision and savings provision were crafted by Congress

with the intent to ensure that the Act did not preempt any such common law actions.

1. *The Senate Bill*

The bill reported out of the Senate Commerce Committee and passed by the full Senate—S. 3005, 89th Cong., 2d Sess. (introduced on March 2, 1996)—contained a preemption provision, section 104 of the bill, similar to the bill ultimately enacted into law, except that it did not contain the "same aspect of performance" limitation. *See* 112 Cong. Rec. 14,257 (1966). But the Senate bill did *not* include a savings provision. Even so, the Senate Committee Report stated, with respect to the preemption provision of the bill, that:

> [T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law. [S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966).]

And Senator Magnuson, the sponsor of the Senate bill, stated on the floor of the Senate that:

> Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The *common law on product liability still remains as it was.* [112 Cong. Rec. 14,230 (1966) (emphasis added).] [18]

2. *The House Bill*

a. The original House bill contained a preemption provision, section 102(b) of the bill, similar to the preemption provision in the Senate bill, and like the Senate bill did not contain a savings provision. *See* H.R. 13228, 89th Cong., 2d Sess. (introduced on March 2, 1966).

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[18] *See infra* note 22 for a discussion of what "need not" and "not necessarily" meant.

During the Interstate and Foreign Commerce Committee hearings on that bill, an attorney from South Carolina raised the following pointed concern regarding the possible effect of the House bill on the liability of manufacturers under state law:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded. [*House Hearings* at 1249 (testimony of Mr. Tom Triplett).]

Representative Farnsley, a member of the Committee, referred to this testimony a few moments later:

> This gentleman has raised, perhaps not brilliantly but I think well, [a] question. . . .
>
> He said Brer Rabbit told Brer Fox "Don't throw me in the briar patch." . . .
>
> . . . Now the question is up: Is the manufacturer responsible for inherent dangerous design? If there are Federal standards, this man has said this brings an absolute wall against those suits, and he feels that the manufacturers want these standards. I think maybe he has a point.
>
> . . . .
>
> [T]he courts, under the old common law and our statutes, hold them responsible. Now I think we

> should take a long time before we change that responsibility. I have talked longer than I intended to, but I feel this is very important. [*Id.* at 1256-57.]

Representative Farnsley then engaged in the following colloquy with Committee Chairman Staggers, who was the sponsor of the House bill:

> THE CHAIRMAN. I would say to you again, and I have this much faith and I know you do too, in the men who sit on this committee, that *we will not put an umbrella over anyone.*
>
> MR. FARNSLEY. Good. You believe, then, you can set Federal standards and this isn't a defense in a lawsuit, to say, "We have met Federal standards"? That is what this witness said.
>
> THE CHAIRMAN. *That is not the intent of this legislation.*
>
> MR. FARNSLEY. I know it is not the intent, but is it possible?
>
> THE CHAIRMAN. It could be if we did not accept our responsibility here as a committee. *But we do not intend to put that umbrella up, I assure you.* [*Id.* at 1258 (emphasis added).]

Representative Mackay intervened to drive home the point:

> With regard to title I, which I predict is going to be the real hard nut to crack in the minds of the committee because of its complexity, the agency bill provides for certification of vehicles that actually met *minimum* safety standards.
>
> This does not preclude building a car with higher standards of safety, *nor does it relieve makers of any legal liability whatsoever in terms of their obligation to the consumer.* [*Id.* at 1260 (emphasis added).]

b. Consistent with the foregoing, the House Committee amended the original House bill. Specifically, the Committee inserted a savings provision, section 108(c) of the House bill, identical in all respects to the savings pro-

vision ultimately included in the bill signed into law: "Compliance with *any* Federal motor vehicle safety standard issued under this title does not exempt *any* person from *any* liability under common law." *See* 112 Cong. Rec. 19,625, 19,657 (1966) (emphasis added).[19]

The savings provision was explained in the House Committee Report as follows:

> *Common Law Liability.* Section 108(c) of the reported bill provides that compliance with any Federal motor vehicle safety standard does not exempt a person from any liability under common law.
>
> It is intended and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability.* [H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) ("*House Report*") (emphasis added).]

c. During the floor debates on the reported House bill, Representative O'Neill proposed an amendment that would have strengthened the remedial provisions of the bill by adding criminal penalties for willful violations of the Act. In opposing this amendment, Representative Dingell, a member of the House Committee that had reported the bill, stated:

> We are told . . . that this legislation is not strong enough. A look at the bill, at what the committee has brought to the floor, disproves this. . . . [*W*]*e have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser.* This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain

[19] The preemption provision in the original House bill was also amended to add the phrase "aspect of performance." No explanation of this change appears in the House Committee Report.

> in the buyer, and they can be exercised against the manufacturer. [112 Cong. Rec. 19,663 (1966) (emphasis added).]

The amendment was defeated. *Id.* at 19,664. The reported bill then passed the full House with certain minor amendments not relevant here. *Id.* at 19,664-669.

3. *The Senate-House Conference*

A Senate-House Conference Committee was convened to reconcile the differences between the Senate and House bills. The Conference Committee adopted the savings provision of the House bill *in haec verba*, and also adopted the House version of the preemption provision with certain minor changes not relevant here.[20]

The Conference Committee Report made no mention of the Senate's agreement to the savings provision included in the House bill. But the Senate conferees' understanding of the savings provision was clearly stated on the floor of the Senate by Senator Magnuson, the sponsor of the Senate bill, as well as by Senator Cotton, a conferee. Senator Magnuson stated:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle developed in the Senate report.[21] This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules of evidence are intended to be altered by this provision. [112 Cong. Rec. 21,487 (1966).]

And Senator Cotton explained:

[20] Those minor changes are described in the Conference Committee Report. *See* H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966).

[21] *See supra*, p. 21.

> The Senate conferees also yielded on a provision, inserted by the House, declaring that compliance with any Federal standard does not exempt any person from liability under common law. Nevertheless, it seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it. [*Id.* at 21,490.] [22]

D. The Lessons

This review of the language and history of the Safety Act's preemption provision and savings provision should dispose of any argument that the Act expressly preempts respondents' common law tort claims. As we have shown, the preemption provision does not even come into play here both because state tort law is not a "safety standard" and because Standard 121 does not regulate the "aspect of performance" at issue in the common law tort claims brought by respondents. More fundamentally, as the language of the preemption provision and the savings provision reveals, and as the legislative history confirms, Congress did not intend those provisions to preempt common law tort actions. The history shows that Congress did not intend the preemption provision to have that effect, and Congress made doubly certain that it would not by adding the savings provision, which is stated in sweeping and unambiguous terms. The House Report summarizes the point in words that bear repeating here:

> It is intended and [the savings provision] specifically establishes, that [as a matter of federal law] compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to . . . tort liability. [*House Report* at 24.]

Thus, the language and history of these provisions leave no room for the conclusion that the Safety Act expressly preempts respondents' common law tort claims. It is simply implausible to find in the preemption provision and the savings provision a " 'clear' and 'manifest' " federal statutory purpose "[t]o displace traditional state [law] in such a manner." *BFP v. Resolution Trust Corp.*, 114 S. Ct. at 1765 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)). To the contrary, Congress reconciled the federal interests in regulating motor vehicle safety and the state interests in preservation of common law tort remedies for those injured in motor vehicle accidents by determining that both schemes could and should coexist.

E. Responses to Petitioners' Contentions

Petitioners' particular contentions in support of their position that the Safety Act expressly preempts the common law tort actions here merit only brief discussion. Petitioners and their *amici* argue, on the premise that the preemption provision applies here, that the savings provision does not serve to defeat the application of the preemption provision.

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[22] One of petitioners' *amici* seeks to make much of the fact that in the Senate Report and in Senator Magnuson's floor comments on the reported Senate bill—all of which predated the House's addition of the savings provision ultimately adopted in Conference—reference was made to the fact that federal standards would "not necessarily" shield any person from common law liability (*see supra*, p. 21), the supposed implication being that certain categories of common law actions might be foreclosed by the Safety Act. *See* Brief *Amicus Curiae* of the Product Liability Advisory Council, Inc. at 22-23. However, the later statements of Senators Magnuson and Cotton explaining the Conference Report indicate that the phrase "not necessarily" was intended merely to clarify the point that the Safety Act would not override the application of *state law* that may allow tort defendants to introduce evidence of compliance with federal standards as bearing on the reasonableness of their conduct. In Senator Cotton's words, state courts are free to determine the "relevance and weight" to be accorded compliance with federal standards. Thus, compliance with federal safety standards might, but would "not necessarily," shield manufacturers from liability in any given tort case, depending on the *state* law.

Petitioners' first argument is that the savings provision is intended only to establish that compliance with federal safety standards does not preclude common law liability "in respect to matters that the agency does not address." Pet. Br. 29 n.16; *see also id.* 38-39. In other words, according to petitioners, "the [savings] provision would explicitly establish the absence of any implied field preemption broader than the express field preemption laid down in Section 1392(d)." *Id.* 29 n.16. The simple answer to this argument is that it cannot be squared with the language of either the preemption provision or the savings provision.

As we have discussed, the preemption provision by its terms applies only when there is a federal safety standard in place and a state safety standard regulates "the same aspect of performance" as the federal standard. Thus, the scope of the preemption provision is clearly limited to situations where state and federal regulations address the same matter. The preemption provision cannot be read to give rise to any "broader" field preemption of matters not regulated by the federal agency. Accordingly, there would be no reason for the savings provision to address the prospect of such "broader" field preemption.[23]

In any event, the terms of the savings provision are not susceptible to petitioners' reading. "Compliance with *any* federal motor vehicle safety standard" is all-inclusive language that cannot be read to exclude standards that regulate the very conduct at issue in a common law action.

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[23] Petitioners effectively concede the point when they note "the rarity with which congressional intent to preclude States from acting in an entire area of regulation may be found *implicit* in a statute that contains a more limited express provision addressing that very question." Pet. Br. 25 (emphasis in original). *See also* Brief of *Amicus Curiae* Product Liability Advisory Council, Inc. In Support Of Petitioners 28-29.

Petitioners' second argument in support of express preemption proffers yet another interpretation of the savings provision. Under this interpretation, the savings provision is meant only to prohibit state law from making compliance with a federal safety standard a defense in a common law tort action. Pet. Br. 37-38 n.28. Judge Selya, in his dissent in *Wood v. General Motors Corp.*, 865 F.2d at 426, articulated the central fallacy of this interpretation: "It would be a strange 'savings clause' indeed which could salvage an action on the merits in this fashion but be impuissant to stop preemption . . . ." And the House Report specifically belies this "strange" interpretation of the savings provision: "[C]ompliance with safety standards is not to be a defense *or otherwise to affect the rights of* parties under common law particularly those relating to . . . tort liability." *House Report* at 24 (emphasis added). This is the tenor of the entire legislative history of the savings provision. *See supra,* pp. 20-26.

Moreover, it would be equally strange for Congress to purport to dictate to the States the contours of a defense in a common law action. As we have discussed, the contrary is true. In the words of Senator Cotton: "[I]t seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any [common law] proceeding for such relevance and weight as courts and juries may give it." 112 Cong. Rec. at 21,490.

Finally, petitioners appear to suggest, based on *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), that where a statute contains both a preemption provision and a savings provision, the former must be deemed to supersede the latter where both provisions apply. Pet. Br. 35-36 & n.26. Putting aside our submission that the preemption provision in the Safety Act does *not* apply here, *see supra,* pp. 15-19, petitioners' suggestion misses the point of *Morales.* The Court in *Morales* found that the preemp-

tion provision in that case superseded the savings provision for two specific reasons: the preemption provision specifically addressed the subject in question while the savings clause did not; and the preemption provision was added to the statute in subsequent legislation leaving the savings provision, insofar as it might apply to the subject matter addressed by the preemption provision, a "relic" of the prior statutory regime. 112 S. Ct. at 2037.

The circumstances here are virtually the opposite of those in *Morales*. Here, it is the savings provision, not the preemption provision, that specifically addresses the effect of the Safety Act on common law claims; and here, it is the savings provision that was added to a bill that already contained the preemption provision. If anything, *Morales* would support the notion that if the preemption provision and the savings provision here were somehow in tension—which we have shown they are not—the savings provision would control.

Thus, none of petitioners' arguments provides a basis for reading the language and history of the two pertinent provisions of the Safety Act to mean anything other than what we have shown them to mean. And we have shown that those provisions do not preempt the common law tort actions here.

II. THERE IS NO IMPLIED PREEMPTION HERE

Petitioners argue in the alternative that the Safety Act impliedly preempts the state common law action here. Petitioners' contention rests on the factual premise that if respondents are successful in their common law actions, the result of those actions would be in conflict with Standard 121. And petitioners' contention rests on the legal premise that, notwithstanding the specific and unqualified language of the savings provision, Congress must have intended implicitly that the Safety Act would preempt common law actions that conflict with a federal safety standard.

As we show in this part of the brief, both of petitioners' premises are incorrect. Either showing alone is sufficient to defeat petitioners' implied preemption claim.

A. Respondents' Common Law Claims Do Not Conflict With Standard 121

The threshold premise of petitioners' implied preemption argument is that a conflict exists between Standard 121 and the relief sought in respondents' common law tort actions. In fact, there is no such conflict. Therefore, whether or not the savings provision leaves room for implied conflict preemption of common law actions, there could be no such preemption here.

"The 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" *English v. General Elec. Co.*, 496 U.S. at 90 (ellipsis and brackets by Court in quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)). Here, petitioners ask this Court to seek out a conflict where clearly none exists.

As we have shown, Standard 121, as amended, does not impose any requirement on manufacturers of trucks and trailers to install or not to install antilock devices. The amended Standard expressly states that the provisions of the Standard deemed to require antilock devices "are not applicable to trucks and trailers." *See supra*, pp. 7-8.

Nevertheless, petitioners contend that, if they are found liable in the common law actions here as a result of their failure to install antilock brakes, that result would conflict with Standard 121. Petitioners apparently seek to invoke the doctrine that, when consistent with the intent of Congress, implied conflict preemption may be found "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204

(1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Petitioners assert that the common law actions here would be obstacles to the accomplishment of the objectives of Standard 121 based upon two different characterizations of that Standard.

First, petitioners contend that "Standard 121 embodies a determination . . . [that] *requiring* [antilock] brakes would itself present an unreasonable risk to safety, in contravention of the Safety Act." Pet. Br. 16 (emphasis in original). This characterization of Standard 121 is too clever by half and does not, when analyzed, serve petitioners' cause.

Nothing in Standard 121 indicates that antilock devices for trucks or trailers are inherently dangerous. Had NHTSA made such a finding, presumably the agency would have adopted a standard prohibiting the use of such devices. But, to the contrary, in the original Standard 121, NHTSA had determined, based on the record before it, to require the installation of antilock devices on trucks and trailers. It was the Ninth Circuit in *Paccar*, based on its own review of the record, that concluded that while antilock devices achieved safety advances on some trucks and trailers, "there is a strong probability that the performance of *a substantial number of vehicles*" was rendered "potentially more hazardous" by the installation of antilock devices. 573 F.2d at 643 (emphasis added). Thus, the Ninth Circuit concluded that on some trucks and trailers the use of antilock devices might be a hazard, and on that basis the court held that the agency could not enforce the requirement, which applied to all trucks and trailers, without more evidence. *Id.*

Based on the *Paccar* decision, as we have discussed, NHTSA determined to amend Standard 121 to make the antilock device requirement inapplicable to trucks and trailers. At the same time, NHTSA rejected a request that it "make a finding that all vehicles built to conform to

the invalidated requirements contain a safety-related defect that justifies their recall." 44 Fed. Reg. at 9784. To the contrary, NHTSA "recommend[ed] that antilock systems on existing vehicles be maintained . . . in order to achieve the benefits for which the systems were designed." *Id.* And NHTSA noted with apparent approval that certain manufacturers were continuing to install antilock devices on trucks and trailers, even though no longer required to do so. *Id.* at 9785.

Even if for preemption purposes it were appropriate to attribute to the agency the "findings" of the Ninth Circuit, the net result of this sequence of events does not leave amended Standard 121 in conflict with the relief requested in respondents' common law actions. The conclusion that, on a record before the Ninth Circuit in 1978, antilock devices might be potentially hazardous on some trucks and trailers, thereby calling into question the validity of an across-the-board antilock device requirement for all trucks and trailers, is in no way inconsistent with a finding that it was tortious for particular truck manufacturers to fail to install such devices on particular trucks manufactured in 1982 and 1987—the particular trucks that, respectively, killed Mrs. Lindsey and maimed Mr. Myrick.

Petitioners will be free in defense of the common law actions here to present whatever evidence they believe may support the reasonableness of their determination not to install antilock devices. Whatever decision may eventuate as to the particular trucks involved here, that decision will not conflict with the federal determination not to impose a requirement to install antilock devices on *all* trucks and trailers.

Second, petitioners assert that Standard 121 "deliberately afforded truck manufacturers an option to install or to omit antilock brake systems." Pet. Br. 17. To the extent that this characterization is accurate, it is simply a meaningless truism. Any decision not to regulate an

area of conduct necessarily results in actors being free to choose among the available courses of action in that area of conduct. To say that government confers an "option" by failing to dictate choices is to reverse the normal understanding of the relationship between the government and the citizenry. And part of that normal understanding is that when a citizen acts in an area where his choices are not constrained by positive law, he is responsible for the consequences if his choices are tortious and result in injuries to others.[24]

In short, the relief sought in these common law tort actions is in no way inconsistent with any requirement or objective of Standard 121.

B. The Express Provisions of the Safety Act Leave No Room for Implied Preemption of Common Law Tort Actions

1. *The Applicable Principles*

As we have already discussed, the Safety Act contains an express preemption provision (15 U.S.C. § 1392(d)),

[24] Of course, Congress or a federal regulatory agency could make an affirmative determination to build a number of specific options into a federal regulatory scheme, based on the judgment that to do so would further federal interests. In that event, the availability of each of the specified options might be integral to the federal regulatory scheme, and a state regulation that interfered with the availability of any one of those options might be inconsistent with the federal scheme. *See Fidelity Fed. Savs. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982). Standard 121 reflects no such affirmative determination.

But even if a federal regulation expressly specifies options (as Standard 121 does not), that does not necessarily mean that there is a federal interest in maintaining the availability of each specified option. The options may have been enumerated merely to provide guidance to manufacturers that choosing any of those options would constitute compliance with a federal mandate. In that event, there would be federal indifference as to which of the options a manufacturer chooses. And state tort law preferring one of the options would not conflict with federal interests.

which defines the circumstances in which a state safety standard is to be preempted, and an express savings provision (15 U.S.C. § 1397(k)), which provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Petitioners ask this Court to find that, despite these express provisions, Congress intended that courts would imply preemption, where Congress has not provided for it, indeed, where Congress on the plain words of the savings provision has precluded it.

When a federal statute is claimed to preempt state law, whether that claim rests on an express provision of the statute or on an implication from the substantive provisions of the statute, the question raised is simply and only as to the intent of the Congress that enacted the statute. *BFP v. Resolution Trust Corp.*, 114 S. Ct. at 1765. *See also supra* note 10. In ascertaining the intent of Congress,

> [a]s always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." [*Norfolk & Western Ry. Co. v. American Train Dispatchers Assoc.*, 111 S. Ct. 1156, 1163 (1991) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)).]

Careful attention to the intent of Congress is of particular importance when the issue involved is displacement of traditional state laws. Thus, even where, unlike here, Congress has not expressly addressed the issue of preemption, preemption by implication will not be found unless the intent of Congress to accomplish that result is " 'clear and manifest.' " *BFP v. Resolution Trust Corp.*, 114 S. Ct. at 1765 (quoting *English v. General Elec. Co.*, 496 U.S. at 79).

In this regard, it is useful to consider the 1989 Report of the United States Appellate Judges Conference of the American Bar Association, entitled *The Law of Preemption*, which states:

> Our federal system, with its high regard for the several states' powers of governance, requires that judges not preempt state laws lightly. Concerns of democratic theory and judicial competence generally counsel courts to attend to Congress's clearly expressed intent. When courts consider whether Congress intended to preempt state laws, however, the nation's commitment to federalism would seem to argue for an especially clear statement of congressional intent to oust states from their traditional legislative functions. For if in close or uncertain cases a court proceeds to preempt state laws where that result was not clearly the product of Congress's considered judgment, the court has eroded the dual system of government that ensures our liberties, representation, diversity, and effective governance. [United States Appellate Judges Report at 40 (footnote omitted).]

At the very least, the foregoing principles and considerations preclude implication of a congressional intent to preempt state laws when, as here, Congress has directly spoken to the precise question of preemption at issue and has in express terms declared its intent not to preempt. Without belaboring the point, by its plain and unambiguous terms, the savings provision flatly and unqualifiedly precludes preemption of any common law action based on compliance with any federal safety standard. *See supra*, pp. 19-20.

This Court in *Cipollone* made clear that, under these circumstances, courts cannot justify an implication that Congress intended to provide for preemption:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when

> that provision provides a "reliable indicium of Congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S., at 505, 98 S. Ct., at 1190, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 107 S. Ct. 683, 696, 93 L. Ed. 2d 613 (1987) (opinion of Marshall, J.). [*Cipollone*, 112 S. Ct. at 2618.]

Accord id. at 2625 (Blackmun, J., joined by Kennedy, J., and Souter, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("We resort to principles of implied pre-emption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law—only when Congress has been silent with respect to pre-emption.") (internal citation omitted).

Here the plain terms of the savings provision, and the clear confirmation of those terms in the legislative history, provide a "reliable indicium" that Congress did not intend federal safety standards to preempt common law tort actions. Therefore, the implied preemption of common law claims by the Safety Act is foreclosed by the Act's express provisions.

2. *Responses to Petitioners' Contentions*

We respond here briefly to particular arguments raised by petitioners to justify implied preemption in the face of the express provisions of the Safety Act to the contrary.

First, petitioners argue that implied conflict preemption cannot be foreclosed by the expression of a congressional intent to preserve certain state laws, because in the event of a conflict between the substantive provisions of a state law and those of a federal law, the state law necessarily falls "by direct operation of the Supremacy Clause." *See* Pet. Br. 17-19, 21-22.

This argument is simply wrong. By its terms, the Supremacy Clause provides that the "Constitution" and "the Laws of the United States which shall be made in Pursuance thereof" are "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. If a "Law[] of the United States" expresses a congressional intent not to preempt certain state laws that a court might otherwise deem to be in conflict with the federal statute, that express congressional intent is part of "the supreme law of the Land," and it must be respected as much as other provisions of the statute. Petitioners cannot avoid the simple truth that whether state laws are "invalid under the Supremacy Clause depends on the intent of Congress." *Malone v. White Motor Co.*, 435 U.S. at 504.

Second, petitioners proffer a lengthy argument that the *Cipollone* passage quoted above cannot mean what it says. Pet. Br. 19-22. Petitioners posit that there are circumstances where Congress will have focused on the preemptive effect of a statute as to a particular area of state law and expressed a view thereon in the statute, without intending thereby to nullify the implied preemption that otherwise would be found with respect to *other* areas of state law as to which Congress has not expressed a view on preemption. *Id.* 20. But petitioners are simply misreading the passage from *Cipollone*. The passage contains an important limitation that addresses petitioners' concern: the express preemption provision must be a "reliable indicium of congressional intent with respect to state authority." *See supra*, p. 37. In the situation posited by petitioners, where Congress has not addressed the preemptive effect of a statute on a particular body of state law, it should be demonstrable that the preemption provision in the statute is not a "reliable indicium" of congressional intent with respect to preemption of that body of state law.

In any event, petitioners' argument in this regard has no application to this case. Here, the savings provision

is explicitly directed at the entire body of common law tort actions. And the plain language and legislative history of that provision make clear—are "reliable indici[a]"—that Congress intended that body of state law not to be preempted by the Safety Act.

Third, petitioners contend that "it has long been clear that when Congress addresses the question of state authority through a broadly worded savings clause, it is *not*, absent clear statement, to be inferred that Congress has allowed the States to contradict its regulatory policies." Pet. Br. 22-23 (emphasis in original). Petitioners jump from that contention to the conclusion that "a broad savings clause that *explicitly* and sweepingly preserves state authority will not ordinarily be read to oust conflict preemption and thus does not preserve conflicting state laws." *Id.* 23. (emphasis in original).

The proposition that courts ordinarily do not give full effect to savings clauses that "explicitly" preserve state authority is itself a sweeping statement, which is on its face inconsistent with the basic principles governing preemption that we have previously discussed. *See supra*, pp. 11-13. Not surprisingly, the cases relied upon by petitioners do not support the proposition. Each of those cases turned on the specific language of the savings provision at issue and on the role of that provision in the statutory scheme as a whole. And, based on analysis of those materials, each of the cases petitioners cite found that the particular savings clause at issue did not reflect a congressional intent to bar conflict preemption.

Thus, in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the scope of the savings provision at issue was limited by the words "Nothing in this section"—as distinct from a phrase such as "nothing in this Act"—and, as a result, according to the Court, the savings provision "does not purport to preclude preemption of state law by other provisions of the Act." *Id.* at 493. The conflict

preemption asserted in the case was said to flow from those "other provisions of the Act." Accordingly, the Court stated that "[t]o begin with, the plain language of the [savings] provision[] . . . by no means compels the" conclusion that a conflict between those other provisions of the Act and state law could not result in preemption. *Id.* And the Court concluded "that the Act itself does not speak directly to [that] issue." *Id.*

Similarly, petitioners rely on a line of cases interpreting a savings provision in the Interstate Commerce Act. Pet. Br. 23. In that Act, the savings provision at issue purported to preserve state common law and statutory remedies with the following proviso: "but the provisions of this act are in addition to such remedies." *See Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981). In each case, the Court found that the "manifest" and "evident[]" purpose of the savings clause was to preclude the possible inference from other provisions of the Act that the federal remedies provided by the Act were exclusive, which would have prevented the States from exercising concurrent jurisdiction over claimed violations of the Act. *Abilene Cotton*, 204 U.S. at 446-47; *Puritan Coal Mining*, 237 U.S. at 129; *Kalo Brick & Tile*, 450 U.S. at 328. But, given the language of the proviso—that the remedies of the Act "are in addition to" state remedies—the Court also concluded in these cases that the savings clause was not meant to preserve the ability of the States to provide remedies inconsistent with the substantive provisions of the Act.

The savings provision here does not contain a limitation or proviso of the type found in the savings provisions at issue in the cases cited by petitioners. To the contrary, the savings provision here contains no qualifying or limiting language. The cases cited by petitioners in this regard

thus do nothing to further the inquiry here. And the lesson petitioners seek to draw from those cases is sheer overstatement.

Fourth, propped up by the premises they have drawn from their three preceding arguments, petitioners make one final contention: to avoid a "radical[]" transformation of what petitioners believe this Court's preemption jurisprudence to be, the *Cipollone* passage quoted *supra*, pp. 36-37, should be read narrowly so as to apply only to implied *field* preemption and not to implied *conflict* preemption. Pet. Br. 24-28.

At the outset, we note that *Cipollone* itself involved a claim of implied *conflict* preemption, not implied *field* preemption. 112 S. Ct. at 2615. And the quoted passage itself makes no distinction between implied conflict preemption and implied field preemption. Indeed, both the concurring opinion and the dissent in *Cipollone* read the passage to cover *both* types of implied preemption. *See* 112 S. Ct. at 2625 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2633-34 (Scalia, J., dissenting).

More fundamentally, the *Cipollone* passage is well within the mainstream of this Court's established principles governing statutory interpretation in general, and preemption analysis in particular. *See supra*, pp. 11-13, 35-36. Where, as here, Congress makes the express and unqualified judgment to preserve common law claims, it is not a novel concept to hold that courts must defer to that judgment. If any notion is a "radical" departure from established principles, it is the notion that courts should ignore the express words of a statute and imply a result that is directly contrary to those words.

In the language of the savings provision here, and in the historical materials underlying that provision, Congress chose to reconcile the federal interest in regulating motor vehicle safety with the States' historic police powers

by preserving the States' traditional power to provide common law remedies for traffic accident victims even when the defendant is in compliance with federal regulations. The sum and substance of petitioners' position is that this Court should redraw the balance between state and federal interests that Congress carefully crafted in the Safety Act. This Court recognized in *Cipollone* that that is not this Court's function.

This Court made the same point when a similar argument was made in *Silkwood v. Kerr-McGee Corp.*:

> We also reject Kerr-McGee's submission that the punitive damages award in this case conflicts with Congress' express intent to preclude dual regulation of radiation hazards. As we explained in Part A, Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards. *We are not authorized to second-guess that conclusion.* [464 U.S. at 257-58 (citation omitted) (emphasis added).]

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit in this case should be affirmed.

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No. 94-286

Supreme Court, U.S.
FILED
DEC 29 1994
OFFICE OF THE CLERK

IN THE
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OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
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v.
BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents and their *amici* devote much of their argument to refuting the proposition advanced by several of petitioners' *amici* (*e.g.*, Amer. Tr. Ass'n *et al.* Br. 12-15; Prod. Liab. Adv. Council Br.) that the Safety Act preempts any state-law standard (whether statutory, administrative, or common law) that differs from a Safety Act standard addressed to the same matter. There is much to be said on both sides of that question, but it is not the question petitioners presented to this Court for review. And it is not the question decided by any of the three courts below.

The Eleventh Circuit and both district courts agreed that the state-law tort standards in issue here conflict with Standard 121 in the ordinary conflict-preemption sense. Judge Forrester (in *Myrick*) explained that NHTSA's post-*Paccar* "[d]eletion [from Standard 121] of the provisions that would have required anti-lock devices was intended to *promote* safety. Plaintiff's theory that failure to install such devices results in an inherently unsafe system directly conflicts with the purpose behind the amendment of Standard 121." Pet. App. 41a. Judge Shoob (in *Lindsey*) stated simply that he found Judge Forrester's holding persuasive. *Id.* at 47a. And the court of appeals also agreed, concluding that this case was indistinguishable in this respect from its earlier air-bags case. *Id.* at 10a.

The only point of disagreement between the Eleventh Circuit and the two district courts was over the legal consequences of the conflict they all agreed exists here: whether in the face of that conflict the state law nonetheless prevails. The Eleventh Circuit concluded that conflict preemption is rendered unavailable by the express preemption provisions of the Safety Act, basing that conclusion on a principle of preemption law it derived from a brief passage in this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). The question presented to this Court is whether conflicting state tort standards do in fact survive by virtue of the principles of *Cipollone* or the provisions of the Safety Act. Pet. i; Pet. Br. i. Our opening brief argued, contrary to the Eleventh Circuit, that (a) *Cipollone* does not mean that conflict preemption is generally ousted by the presence of express preemption provisions (Pet. Br. 17-28); that (b) the Safety Act provisions in particular do not preserve state tort standards that conflict with federal law (Pet. Br. 34-42); and indeed (though unnecessary to the resolution of this case) that (c) the Safety Act expressly preempts state tort standards that conflict with federal law (Pet. Br. 30-34).

Respondents dispute all of these propositions. Resp. Br. 15-30, 34-42. Nothing they say, however, either about preemption law generally or about the Safety Act's language and legislative history in particular, remotely establishes—what no case of this Court evidently has ever before found—that Congress licensed States to defeat substantive federal regulatory determinations. *See also* NCSL *Amicus* Br. 15-24; ATLA *Amicus* Br. 16-30. The United States, for its part, agrees with our first two propositions (which suffice for reversal): neither *Cipollone* nor the Safety Act authorizes state tort law to contradict federal law. U.S. Br. 19-24. The United States could hardly do otherwise, for the Eleventh Circuit's view of *Cipollone* would jeopardize an unspecifiable but potentially vast range of federal law (U.S. Br. 20), and a construction of the Safety Act as ousting conflict preemption would require the United States to repudiate (as it is unwilling to do, U.S. Br. 28-29) its position before this Court supporting conflict preemption in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990).

In light of the flaws in the Eleventh Circuit's bases of decision, respondents (along with the United States) must find an alternative ground on which to suggest affirmance of the judgment. They accordingly contend that there is no conflict between state and federal law in this case. Resp. Br. 31-34; U.S. Br. 24-30. But this intensely standard-specific contention, requiring review of the extensive pre- and post-*Paccar* history of Standard 121, was rejected by all three courts below, has not been accepted by any other court, and was not an argument raised in the brief in opposition as a ground for denying the premise of the question presented—the presence of a conflict. Sup. Ct. R. 15.1; *see* page 11, *infra*. In any event, the contention is incorrect and should, if reached, be rejected by this Court.

I. THE EXISTENCE OF PREEMPTION PROVISIONS DOES NOT GENERALLY OUST CONFLICT PREEMPTION.

Respondents seek to defend the Eleventh Circuit's conclusion that, under *Cipollone*, when Congress writes express preemption provisions into a statute, conflict preemption is all but automatically ousted. Resp. Br. 34-42. For reasons set forth in our opening brief (at 17-28) and in the Solicitor General's brief (at 19-24), this position makes no sense, is not supported by *Cipollone*, and cannot be squared with longstanding precedent.

A. Although respondents round up the usual quotes invoking the principle that "whether state laws are 'invalid under the Supremacy Clause depends on the intent of Congress' " (Resp. Br. 38, quoting *Malone v. White Motor Co.*, 435 U.S. 497, 504 (1978)), they confuse two kinds of congressional intent: a specific *preemptive* intent, and a substantive *regulatory* intent. As the Solicitor General explains, conflict preemption, unlike both express and implied field preemption, "does not depend on a specific, affirmative intent by Congress to supersede conflicting state law." U.S. Br. 21. Conflict preemption depends only on the congressional intent behind substantive legislation or congressional intent to authorize substantive regulation through administrative proceedings. *Id.* at 20-21 (quoting and citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-43 (1977), and *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). Respondents cite not a single decision in which this Court has rejected conflict preemption for lack of specific congressional intent to displace state law, where the state law conflicted with substantive federal measures.

This absence of supporting precedent confirms that the Eleventh Circuit's position makes no constitutional or practical sense. *See* Pet. Br. 19-22. As a constitutional matter, it is perverse to suppose that Congress, when taking the trouble to single out an area for complete occupation by federal law, is by that very action otherwise

abrogating the normal supremacy of federal law over conflicting state law. *See* U.S. Br. 21. And as a practical matter, Congress cannot realistically be expected to "foresee all the possible ways in which the States might adopt measures in the future that would bear upon the federal scheme." *Id.* at 19-20. The absurdity of any presumption of perfect congressional foresight is heightened when, as in this case, the substantive regulatory determinations are not made by Congress itself but are to be made through administrative processes.

Not surprisingly, respondents back away from the Eleventh Circuit's notion that *Cipollone* makes ouster of conflict preemption virtually automatic when Congress writes express preemption provisions. Resp. Br. 38, 41. They hasten to place great emphasis on the prerequisite that the express preemption provisions constitute a " 'reliable indicium of congressional intent with respect to state authority.' " *Id.* at 38, quoting *Cipollone*, 112 S. Ct. at 2618. Of course, Congress has the power to authorize state law to contradict its enactments, but whether Congress is to be understood as having done so in a particular statute (which it apparently has never done) must be determined in light of the sensible background principles just noted. The Eleventh Circuit, however, summarily treated the "reliable indicium" condition as "not much of a hurdle," concluding that there is "a presumption that a preemption clause is a reliable indicium of congressional intent." Pet. App. 18a, 19a. But if the "reliable indicium of congressional intent" requirement is meant to have real content, as respondents now suggest, there must be firm ground for concluding that Congress intended to oust conflict preemption and authorize even *conflicting* state law. For all of the reasons we set out in our opening brief (at 24-28), nothing in *Cipollone* can reasonably be taken to establish that Congress is presumed, or can readily be deemed, to be authorizing state law to defeat federal law when it enacts an express preemption provision.

B. A long string of this Court's precedents, in fact, establishes the very opposite principle. Respondents struggle to distinguish those precedents on their facts (Resp. Br. 39-40), but there is no mistaking that this Court has repeatedly affirmed—in decisions as recent as the past several Terms (*John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993); *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992))—the principle that even broad *anti*preemption provisions must presumptively be read *not* to preserve state laws in conflict with substantive federal law. *See* Pet. Br. 22-23. Congress must be understood to have legislated against the background of this well-established principle of statutory construction, which is grounded in the basic command of the Supremacy Clause. *Cf. Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve . . . a violation of the Commerce Clause . . . ." (citing cases)).

The Eleventh Circuit's reading of *Cipollone* is inconsistent with settled understandings reflected in precedent in another, equally telling sense—namely, through what is noticeably missing from this Court's precedents. If the Eleventh Circuit were correct, virtually every statute containing provisions addressed to preemption, which are commonly (if not necessarily) circumscribed in scope, would be read as authorizing a range of state interference with substantive federal policies (outside the reach of the preemption provisions). Yet respondents and their *amici* have not pointed to a single case in which this Court has ever found that Congress meant to authorize States to defeat substantive federal law.

Respondents and one of their *amici* (Resp. Br. 12-13, 42; ATLA *Amicus* Br. 7-8) attempt to suggest that a different rule may apply where state *tort* law is at issue, relying on this Court's statement in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984), that Congress

should not be presumed to "remove all means of judicial recourse for those injured by illegal conduct." But this unelaborated suggestion is wrong for two equally fundamental reasons. First, it confuses field preemption (express or implied) with conflict preemption. *Silkwood* involved only a claim of exclusive federal *authority* in the field of nuclear safety; it did not involve a tort remedy based on a state standard in conflict with any federal safety standard. Neither *Silkwood* nor any other precedent cited by respondents and their *amici*, in finding that Congress had allowed a certain "tension" in selective overlapping federal and state *authority* (U.S. Br. 17), has found congressional approval of state law that *conflicts* with substantive federal regulatory standards.[1]

Second, respondents' *Silkwood*-based suggestion is just as deeply wrong regarding the congressional understandings about tort law that may sensibly be presumed. In our legal system, as ATLA expressly recognizes, tort law generally provides relief only for "wrongful" conduct. ATLA *Amicus* Br. 11; *id.* at 23 ("tortious" injury); Resp. Br. 12 (" 'tortious conduct' "). What conflict preemption means is that conduct cannot be deemed wrongful based on a state standard that conflicts with federal law. Quite simply, it would be every bit as anomalous to presume congressional *preservation* of a damages remedy based on such a standard, which would amount to a tort remedy for conduct that cannot be deemed wrongful, as it would be to presume congressional *displacement* of tort remedies for "illegal" conduct.

II. THE SAFETY ACT DOES NOT AUTHORIZE STATE TORT LAW THAT CONFLICTS WITH FEDERAL LAW.

Shorn of the general rule of preemption law improperly read into *Cipollone*, respondents' defense of the Eleventh Circuit's repudiation of conflict preemption requires a

[1] Notably, when the United States adverts to a "tension" in the Safety Act (U.S. Br. 17), it is referring only to express preemption and only to state standards that are "stricter than" NHTSA's standards, not to any conflict preemption.

demonstration that, in the Safety Act, Congress actually meant to preserve state tort law even when it conflicts with federal law in the ordinary conflict-preemption sense. Such a conclusion would mean, of course, that state tort law could impose liability for conduct that federal law explicitly required and, in addition, that the Safety Act evidently would be the first federal statute ever to come before this Court authorizing such state-law defeat of federal law. Not surprisingly, respondents do not come close to establishing that interpretation of the Safety Act.

A. Although respondents extensively set out not only the language of Section 1392(d) and Section 1397(k) but also excerpts from the legislative history of the Safety Act (Resp. Br. 15-30), a simple perusal of those passages shows that none of the materials remotely discloses a congressional intent to allow state-law standards that conflict with substantive federal standards. The language of Section 1392(d), which is a *pro*-preemption provision, hardly accomplishes such ouster of conflict preemption. The language of Section 1397(k), which says only that mere "compliance" with federal standards does not "exempt" manufacturers from common law liability, could not, without considerable awkwardness, be read as meaning that tort liability could be imposed based on state standards that are in conflict with federal standards. And like the language of Section 1397(k), all of the numerous quoted excerpts from the legislative history are apposite only to the dispute (which petitioners do not enter) as to whether common-law liability is permitted based on state standards that go beyond federal standards. There is no expression of any intent to authorize state tort liability based on standards that conflict with federal standards as "interpreted" by the courts (S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966)).[2]

[2] The Solicitor General comes to the same conclusion. Reviewing the same legislative materials (U.S. Br. 10-18), he concludes that "[t]he legislative history . . . confirms that Congress intended that manufacturers could be held liable in tort, even if their vehicles complied with all relevant federal safety standards" (*id.* at 14). In elaborating (*id.* at 14-18), he carefully avoids stating

B. That is enough to negate the Eleventh Circuit's reading of the Safety Act as ousting conflict preemption. This Court need not go any further. In fact, however, a fair reading of the statute establishes express preemption of state tort standards that conflict with federal standards addressing the same aspect of performance.[3]

As the Solicitor General acknowledges—*see* U.S. Br. 13, citing the 1966 Senate Report, *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737-38 (1993), and *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959)—the language of Section 1392(d), which preempts "safety standard[s]," is naturally read as encompassing state tort-law standards.[4] And in the context

that the preserved tort standards include those in conflict with federal standards, speaking instead only of "safety standards *stricter than* the standards prescribed by NHTSA." *Id.* at 17 (emphasis added). Ultimately, he expressly concludes that the Safety Act does not foreclose conflict preemption. *Id.* at 19-24.

[3] In our opening brief, we noted at three places (pp. 29 & n.16, 34 n.24, 37 n.28) some of the analysis that would bear on the question whether the Safety Act preempts or preserves state tort standards that go beyond, but do not contradict, federal standards. But we have presented this case to the Court (Pet. i) and have argued for reversal only on the premise, accepted by the Eleventh Circuit, that the state-law standards alleged by respondents conflict with federal law. Accordingly, this Court has no occasion to address the extensive arguments of respondents and their *amici* about whether Section 1392(d) and 1397(k) together preserve or preempt all non-identical state common-law safety standards.

[4] The Solicitor General casually suggests at one point that "standard" is a *narrower* term than either "order" or "requirement" and that, while a State may "establish" or "continue in effect" a standard through its legislative or administrative authorities, it does not do so through its judiciary. U.S. Br. 14. Both suggestions are baseless, even linguistically bizarre. Strikingly, the suggestions are inconsistent with the Solicitor General's recent construction of the preemption provision at issue in *American Airlines, Inc. v. Wolens*, No. 93-1286 (argued Nov. 1, 1994): he argued there that (non-contract) common-law duties *are* within the class of "state standards" (Br. 29; *id.* at 16, 17, 28) that a

of the Safety Act, that reading is the only fair one, for three compelling reasons. First, the phrase must be construed in light of the underlying policy (*e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991)), and the policy of uniformity behind Section 1392(d) by itself requires inclusion of tort standards. Second, the provision must be construed so as not to drain Section 1397(k) of meaning—a principle endorsed by respondents themselves (Resp. Br. 28)—yet if common-law standards were outside the preemption provision, "there would be no reason for the savings provision" (*ibid.*). Third, limiting Section 1392(d) to "prescriptive rule[s] affirmatively promulgated by a legislative or administrative body," as the Solicitor General proposes (U.S. Br. 14), creates an incoherent regime in which legislatively codified tort law (including one of respondents' causes of action, *see* Pet. Br. 16 n.9) is covered by the provision, but the uncodified common law of torts (respondents' other cause of action) is not.

For those reasons, the only fair reading of Section 1392(d) is that its preemptive reach embraces common-law tort standards. Of course, the analysis cannot stop there, but must go on to examine Section 1397(k). But the language and legislative history of that provision, as we have discussed, are not enough to preserve *conflicting* state standards under tort law and thus do not, as to such standards, undo the preemption effected by Section 1392(d).

State may not "enact or enforce" under the statute (49 U.S.C. App. § 1305(a)(1) (1988)).

Amicus ATLA, for its part, advances an argument squarely rejected in *Cipollone*—that tort law does not impose any "requirement" on defendants. ATLA *Amicus* Br. 11.

III. THIS COURT SHOULD NOT DISTURB THE CONCLUSION OF ALL THREE COURTS BELOW THAT THERE IS A CONFLICT BETWEEN FEDERAL LAW AND THE STATE TORT STANDARDS ALLEGED IN THIS CASE.

Respondents make one final argument—in which they are now joined by the United States—for affirmance of the judgment below, raising an alternative ground that, as they do not dispute, was rejected by all three courts below. In particular, they challenge the conclusion of the Eleventh Circuit and both district courts that the state-law tort duty alleged by respondents conflicts with the federal determination embodied in Standard 121. Resp. Br. 30-34; U.S. Br. 24-30. That conclusion, which is limited to the particular federal safety standard and state-law standards at issue in this case, should not be disturbed by this Court.

There is no need for the Court to address this standard-specific issue: the conclusion of the three lower courts is uncontradicted by any other judicial decision. And there is good reason for the Court not to address this issue. Respondents' brief in opposition, which focused almost exclusively on the merits of the Eleventh Circuit's decision, questioned the existence of a conflict on only one ground, namely, that Standard 121 could not conflict with any state-law requirement of ABS devices because it does not ban such devices. Br. in Opp. 24, 26. *See also id.* at i. Aside from that claim—which is contrary to settled conflict-preemption principles, as the United States recognizes in standing by the airbags preemption decisions—respondents offered no reason to question the federal-state conflict that formed the premise of the question presented; in particular, they did not present the complex claims now raised about the precise significance of the whole pre- and post-*Paccar* history of Standard 121. These claims were not adequately raised in the brief in opposition (Sup. Ct. R. 15.1), and this Reply Brief is hardly the place to review the extensive relevant materials in detail. *See* note 9, *infra* (brief review). In any

event, as we now discuss, if the Court reaches these claims, it should agree with the courts below that a conflict indeed exists here.

A. As in any case involving conflict preemption, the analysis requires careful attention to the two sides of the equation: the specific federal determination at issue; and the specific state law at issue. On the federal side, the process that Congress put in place for lawmaking under the Safety Act—lengthy rulemaking proceedings, based on extensive research, testing, information gathering, and public comment, followed by judicial review to ensure an analysis consistent with Safety Act and APA standards (15 U.S.C. §§ 1392, 1394, 1395, 1401, 1411)—produced a clear determination that the "comprehensive" record permitted one and only one lawful conclusion: that, because of the complex aspects of the underlying air brakes that NHTSA had newly required, safety considerations could not support, indeed undermined, any *per se* requirement of antilock brake systems. *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 639, 643 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). On the state side of the equation, respondents would have that very requirement imposed under Georgia law on the ground that it was unreasonably unsafe for any manufacturer *not* to install antilock brake systems. *See* Pet. Br. 16 & n.9 (citing Georgia standards invoked by respondents). This, as the courts below concluded, is the basis for classic conflict preemption.

B. Respondents choose to attack this conclusion by focusing on—and mischaracterizing—what is on the state-law side of the equation. Without citing any of their prior pleadings or briefs in this case, or the Georgia law that they have invoked (Resp. Br. 10, 11, 33), they declare that their claim is that "it was tortious for *particular* truck manufacturers to fail to install [ABS] devices on *particular* trucks." Resp. Br. 33 (emphasis added). But that is manifestly not the state-law standard of conduct they have alleged throughout this case. From the beginning,

their claim consistently has been nothing other than that it was *per se* unreasonable for *any* truck manufacturer to have omitted ABS after 1980.[5] That is the claim they presented to the district courts and to the Eleventh Circuit (*see* Pet. App. 3a, 4a, 34a, 40a, 47a), and that is the only claim at issue.

C. The Solicitor General and NHTSA concentrate on the federal-law side of the "conflict" equation. U.S. Br. 24-30. Raising issues not presented by the petition or brief in opposition, the Solicitor General and NHTSA concentrate on questioning the very existence of the federal-law determination regarding an ABS requirement. Secondarily, they try to shrug off the substance of the determination. They are wrong on both scores.

1. The Solicitor General and NHTSA's position that there really is no relevant federal determination rests on two grounds. First, they say that once Standard 121 explicitly declared that no ABS requirement applied to trucks and trailers, the situation became "the same as if NHTSA had never instituted rulemaking concerning stopping distances for trucks and trailers, or had done so but never issued any standard." U.S. Br. 27. Second, carefully avoiding any discussion of *Paccar*'s holding that the rulemaking record compelled the determination that an ABS requirement would be unreasonably dangerous (U.S. Br. 26-30), the Solicitor General and NHTSA repeatedly emphasize that *NHTSA*, as opposed to the court of ap-

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[5] In response to the motions for summary judgment, and in seeking reversal in the court of appeals, respondents never advanced any argument or evidence purporting to distinguish some trucks from others, or some manufacturers from others, with respect to the installation of ABS. Instead, they relied on the simple claim that they had "presented unrebutted evidence that prior to the time of manufacture of the vehicles in question, antilock brakes could be reliably manufactured in mass production, and any tractor or trailer made after 1980 without antilock brakes is defective and unreasonably dangerous." C.A. Br. of Appellants 27-28. *See* Reply Br. of Appellants 15 (same). *See also* J.A. 15 (single affidavit opposing summary judgment).

peals, "has not made any such determination." *Id.* at 27; *see id.* at 30 (Standard 121 "does not reflect any determination *by NHTSA* that installation of ABS devices would be contrary to the safety objectives of the Act" (emphasis added)). Respondents echo the latter point. Resp. Br. 32 (rather than NHTSA, "it was the Ninth Circuit . . . that concluded that . . . 'there is a strong probability that the performance of a *substantial number of vehicles*' was rendered 'potentially more hazardous' by the installation of antilock devices . . ." (emphasis added by respondents)).

a. The claim that the situation is "as if" there were no regulation is quite literally fanciful. Of course, there *is* a regulation, which expressly declares that antilock devices ("which were effectively mandated" by the stopping-distance requirements, U.S. Br. 5) are not required for trucks and trailers. Standard 121 § S3. (The regulations also address numerous other aspects of air brake systems.[6]) And the plain reality is that the regulation's rejection of an ABS requirement is anything but a result of inadvertence, agenda priorities, or failure to consider the matter, as the Solicitor General and NHTSA ask this Court to pretend. The Court has only to look at the pre-*Paccar* and post-*Paccar* history of Standard 121—including years of hearings, extensive revisions in proposed rules, judicial review of the comprehensive record, and agency staff recognition of the substantive safety problems established by the record (*see* Pet. Br. 4-9)—to conclude that Standard 121's rejection of an ABS requirement embodies a determination on the merits of the safety question.

[6] The district court in *Myrick* described some of the numerous requirements, all designed to produce safer stopping of vehicles: "all other aspects of air brake systems on trucks and trailers are regulated by Standard 121, including: reservoirs; towing vehicle protection systems; pressure gauges and warning systems; brake actuation, release, and recovery times; deceleration rates and temperatures; parking brake systems; and road testing. Plaintiffs' claim that truck and trailer braking systems are no longer regulated after *Paccar* is untenable." Pet. App. 41a.

Thus, the history of Standard 121 makes unmistakable that, even more than in the airbags cases that the Solicitor General continues to endorse (U.S. Br. 28-29),[7] there is a substantive federal determination that the requirement at issue would be incompatible with the policies of the statute. Even aside from the plain existence of a regulation on the subject, this determination establishes the federal law for conflict-preemption purposes. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947). In refusing to accept this fact, the Solicitor General and NHTSA are simply continuing their resistance to the Ninth Circuit's decision in *Paccar*, from which they unsuccessfully sought certiorari.

b. The Solicitor General and NHTSA are also wrong in narrowing their focus to *NHTSA*'s determinations and wholly ignoring the judicial review to which NHTSA's actions were subjected. Federal-law determinations are not somehow personal to the administrative agency. Such determinations have the character of a "law of the United States" with preemptive force under the Supremacy Clause (U.S. Const., Art. VI, cl. 2) because they are the result of a properly constituted legal *process*. And under the

[7] The United States seeks to reconcile its position here with its brief *amicus curiae* to this Court in *Wood*, suggesting that the airbags standard (Standard 208) offers an option in a way that Standard 121 does not. U.S. Br. 28-29. But since it is the substantive safety policies of the Safety Act that matter for preemption purposes, this suggestion gets matters backwards. In *Wood*, the United States relied principally on considerations of "public acceptance" (U.S. Br. 28) to justify the airbags option. In contrast to this vague and rather political concern, the basis for the rejection of the ABS requirement, as set forth by the court of appeals in *Paccar*, was directly concerned with safety: the unexplained and potentially deadly failure of ABS devices adapted for use on heavy trucks. *See* Pet. Br. 7. The Eleventh Circuit thus rightly did not try to distinguish *Wood*, recognizing the obvious: that it could not allow liability here without overruling its own prior airbags decision in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

Safety Act, as under virtually every federal statute delegating regulatory authority to administrative agencies, the process begins but does not end with the agency.

Rather, Congress has provided for judicial review as a crucial part of the full rulemaking process, thus ensuring compliance with the authorizing statute, with fundamental duties of reasoned and well-grounded decisionmaking, and, indeed, with the Constitution's non-delegation doctrine (*e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371-73 (1989)). *See* 15 U.S.C. § 1394. Congress plainly intended the court's role in the full regulatory process under the Safety Act to be a serious one, providing that the court may even order the taking of additional evidence, over and above what the agency considered. § 1394(a)(2). *See also* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966) ("the committee specifically provides for judicial review of any order issued under [Section 1392]"); *id.* at 20-21 (stressing court's duty to examine entire record); S. Rep. No. 1301, *supra*, at 8 (noting courts' power to stay agency rule pending review). Thus, particularly for Supremacy Clause purposes, "[t]he court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (Leventhal, J.), *cert. denied*, 403 U.S. 923 (1971); *see, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 552-57 (1990) (interaction of agency and D.C. Circuit led to federal policy).

The courts may not, of course, make determinations that are committed to an agency's discretion under a statute. *Cf.* U.S. Br. 26 n.13. But that is not what the court of appeals did in *Paccar*, though the Solicitor General and NHTSA contended otherwise in unsuccessfully seeking certiorari more than 15 years ago. Instead, the court performed the proper and familiar role of determining that the comprehensive record permitted only one lawful conclusion, leaving the agency no discretion on that record to draw any other conclusion. 573 F.2d at 639, 643.

NHTSA cannot properly deny the existence of the relevant determination by pointing to its own initial *unlawful* refusal to make that determination. When that illegality was corrected after *Paccar*, the result was the federal determination on which conflict preemption below was premised: "a common law standard requiring the installation of anti-lock devices . . . would defeat the policy behind the Safety Act by imposing a design requirement that the Department of Transportation judges to be unsafe, having chosen not to require such devices until they are more reliable." Pet. App. 41a (Forrester, J.).[8]

2. Once the Solicitor General and NHTSA turn their attention beyond the confines of the agency's own actions, and look to the court of appeals ruling in *Paccar* as part of the full administrative process, they largely ignore the substance of the federal-law determination that resulted. In a brief review of the Ninth Circuit's decision (U.S. Br. 25-26), they correctly note what was *not* decided (and what is quite irrelevant here): NHTSA was not ordered to prohibit antilock devices and was not precluded from developing a new record—"after further review (or after subsequent technological advances)"—that might justify an ABS requirement. *Id.* at 26. But the Solicitor General and NHTSA then devote precisely one sentence to saying what the Ninth Circuit *did* determine, characterizing the *Paccar* decision as based on an evidentiary deficiency in the agency record. U.S. Br. 25.

This is incorrect. The *Paccar* court explained: "the comprehensive data before us indicate that there is a strong probability that the performance of a substantial number of vehicles whose braking systems have been

[8] To the extent that the Solicitor General asks in passing for deference to the agency's view of the scope and meaning of the revised Standard 121 (U.S. Br. 29 n.17), this is but another attempt to relitigate *Paccar*. Whatever deference NHTSA is owed in this specific regard was exhausted in that proceeding, which concluded that an ABS requirement was affirmatively dangerous. To overcome that conclusion the agency must formulate and justify a new standard, not seek by indirection to reinstate the old one.

altered to include 'overpowered' front axles and antilock devices has created a potentially more hazardous highway situation than existed before the Standard became operative." 573 F.2d at 643. NHTSA's own response to the 1978 *Paccar* decision, which was *not* to try to fill in supposed gaps in the evidentiary record, confirms that the problem was not one of insufficiently collected evidence. Rather, the "comprehensive" record showed that requiring ABS on all trucks presented a substantive safety problem for many trucks, because of the complex new requirements imposed on the underlying air brake systems themselves. 573 F.2d at 643. And NHTSA's technical staff has repeatedly confirmed this.[9]

[9] *See* Pet. Br. 9 & n.5. For example, a NHTSA staff study in 1987 (NHTSA, *Heavy Truck Safety Study* 86-87 (DOT HS 807 109, March 1987)) explained: "In the early to mid-1970's, NHTSA, through the requirements of FMVSS 121, attempted to establish a set of performance requirements for medium/heavy vehicle air-brake systems. The standard established requirements for brake timing, emergency braking capability, fade and recovery, parking brakes, component/subsystem performance, and short stopping distances without wheel lockup. One of the impacts of this standard was a significant increase in air-brake system complexity—a situation which proved to be troublesome to the industry mainly because they were not fully prepared to maintain the new technology. Also, the lack of reliability associated with the initial antilock systems was the principal reason that the stopping distance requirements, which necessitated the use of antilock brake systems, were struck down by the courts. Since that time, attempts have been made by both industry and government to identify and solve the various problems associated with U.S. air-brake systems, many of which surfaced as a result of having to deal with the original requirements of FMVSS 121 and the numerous modifications that have been made to the standard over the years." That study further noted the inherent engineering tension, confirmed by experience, between improving brake performance in normal circumstances (gradual stopping) and improving performance in extreme circumstances (sudden stopping). *Id.* at 86.

A 1981 NHTSA study of trucks equipped with ABS under the pre-*Paccar* Standard 121 (NHTSA, *Fleet Accident Evaluation of FMVSS 121* 18 (DOT HS 806 261 Aug. 1981)) described the widespread maintenance and reliability problems that plagued ABS devices in conjunction with the more complex air brake systems required by Standard 121 itself. *Id.* at 18-19. And it pointed to

It is beside the point that ABS devices were permitted after *Paccar*, were installed by some truck manufacturers in 1978, and have come into increasing use among truck manufacturers, including petitioners, over the years. It was the imposition of an ABS requirement on *all* truck manufacturers, in all their variety of configurations and operating circumstances, that posed the safety problems underlying the *Paccar* determination and Standard 121's subsequent rejection of an ABS requirement. The determination made in the process leading to *Paccar* and Standard 121, and the only determination relevant here, is that the state of engineering and actual operating environments made a *uniform* ABS requirement flatly unjustifiable in the very safety terms respondents now invoke under Georgia law.

If NHTSA now believes that the safety problems have been resolved, the proper course is to promulgate the proposed regulation requiring ABS that it has had pending for several years. The situation is no different from what NHTSA would have to do if it had a red-blinker standard and concluded that yellow was safer; it would have to change the standard, and until such time, tort liability for using red would be preempted. So here: there is no basis for disregarding the clear outstanding federal determination that safety concerns cannot support (but actually undermine) a *per se* requirement of antilock brake systems. As Judge Forrester explained, respondents' "theory that failure to install such devices results in an inherently unsafe system directly conflicts with" that determination. Pet. App. 41a. The district courts and the Eleventh Circuit were accordingly correct to find that this case falls squarely within the law of conflict preemption.

evidence "that requiring brake systems to be designed to achieve shorter wheels-unlocked stopping distances results in reductions in vehicle stability." *Id.* at 19 (footnote omitted). *See also* NHTSA, *Technical Assessment of FMVSS 121—Air Brake Systems* (Feb. 24, 1978), Docket No. 75-16-6R-038, Apps. H, I.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Dated: December 29, 1994

Supreme Court, U.S.
FILED
DEC 13 1994
OFFICE OF THE CLERK

No. 94-286

In the Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION, PETITIONER

v.

BEN MYRICK, ET AL.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP., PETITIONER

v.

JACK LINDSEY, EXECUTOR OF THE ESTATE AND SURVIVING SPOUSE OF GRACE C. LINDSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether respondents' state common law tort actions are preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. 30101-30169 (formerly 15 U.S.C. 1381-1431 (1988 & Supp. V 1993)), or by Federal Motor Vehicle Safety Standard 121, 49 C.F.R. 571.121.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-286

FREIGHTLINER CORPORATION, PETITIONER

v.

BEN MYRICK, ET AL.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP., PETITIONER

v.

JACK LINDSEY, EXECUTOR OF THE ESTATE AND SURVIVING SPOUSE OF GRACE C. LINDSEY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

Under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381-1431 (1988 & Supp. V 1993), the Secretary of Transportation is required to promulgate appropriate federal motor vehicle safety standards. 15 U.S.C. 1392(a).[1]

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[1] The National Traffic and Motor Vehicle Safety Act was recodified, along with other Acts governing transportation, on July 5, 1994, "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745; see *id.* § 1(e), 108 Stat. 941-973 (codifying new 49 U.S.C. 30101-30169). For convenience,

This case concerns the preemptive effect of one of those standards, governing air brake systems. The Court's decision may have a substantial effect on the manner in which the Secretary exercises his regulatory authority under the Act.

STATEMENT

1. Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act) to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. To effectuate those purposes, the Safety Act requires the Secretary of Transportation to issue appropriate safety standards for motor vehicles and motor vehicle equipment. 15 U.S.C. 1392(a). The Act defines the term "motor vehicle safety standard" to mean "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. 1391(2); accord 15 U.S.C. 1392(a). The Act prohibits the manufacture for sale or introduction into interstate commerce of any motor vehicle that does not meet the standards. 15 U.S.C. 1397(a)(1)(A). The Secretary has delegated the authority to issue standards to the Administrator of the National Highway Traffic Safety Administration (NHTSA). 49 C.F.R. 1.50(a).

The safety standard at issue in this case is Standard 121, which regulates braking systems on vehicles equipped with air brakes, generally heavy vehicles such as buses, trucks, and trailers. 49 C.F.R. 571.121; see *id.* S1. "NHTSA has been concerned about the safety of [such heavy vehicles] * * * equipped with air-brakes since the agency's inception." 58 Fed. Reg. 11,009 (1993). NHTSA estimates that crashes involving the loss of control of such heavy vehicles during

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we will refer to the earlier version of the Act, which appears in the opinions below and petitioners' brief.

braking result in approximately 2500 deaths and 50,000 injuries annually. *Id.* at 50,754.

The two most important indicators of brake performance are "the distance in which a brake system can stop a vehicle from a given speed, * * * [and] the stability of the vehicle while stopping." 35 Fed. Reg. 10,368 (1970). To address those aspects of performance, Standard 121, as initially promulgated by NHTSA, required that vehicles equipped with air brakes be able to stop within certain distances at various speeds, without straying from a 12-feet-wide lane, and without any wheel locking up more than momentarily. See 36 Fed. Reg. 3817 (1971); 49 C.F.R. 571.121 S5.3.1 (1972). Standard 121 also addressed other aspects of brake performance, such as brake actuation and release times, *i.e.*, the speed with which a braking system responds to pressure applied to and removed from the brake pedal. See 49 C.F.R. 571.121 S5.3.3, S5.3.4 (1972); 35 Fed. Reg. 10,369, 10,370 (1970); 37 Fed. Reg. 3905, 3907 (1972).

Although Standard 121 did not expressly require the use of antilock braking systems (ABS), the short stopping distances in the Standard effectively required the use of ABS devices to assure adequate vehicle stability and to prevent wheels from locking up during braking, at least on some vehicles covered by the Standard.[2] See 36 Fed. Reg. 3817 (1971); 39 Fed. Reg. 7966 (1974). After NHTSA issued Standard 121, some manufacturers expressed the view that ABS devices then on the market were unreliable, and that, in the event of a sudden

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[2] An ABS device "helps prevent loss of control situations by automatically controlling the amount of braking pressure applied to a wheel. With these systems, the electronic control unit (ECU) monitors wheel-speeds, and changes in wheel-speeds, based on electric signals transmitted from sensors located at the wheels or within the axle housings. If the wheels start to lock, the ECU signals a modulator control valve to actuate, thereby reducing the amount of braking pressure applied to the wheel that is being monitored." 57 Fed. Reg. 24,213 (1992).

failure of an ABS device, drivers would be unable to modulate the powerful new brakes required by Standard 121, which could lead to a serious loss of control. 39 Fed. Reg. 7966, 7967 (1974); see *id.* at 39,880. NHTSA concluded, however, after reviewing the capabilities of the major ABS device manufacturers, that the available ABS devices were reliable and would not decrease highway safety. *Ibid.*[3]

Several vehicle manufacturers and associations petitioned for judicial review of Standard 121. The Ninth Circuit remanded the matter to NHTSA for further proceedings, *Paccar, Inc.* v. *NHTSA*, 573 F.2d 632, 646, cert. denied, 439 U.S. 862 (1978), concluding that Standard 121 was not based on the "quality of 'reliable information and research' that the Act require[s] as a prerequisite" to issuance of a safety standard, 573 F.2d at 641. The court did not take issue with NHTSA's premise that greater braking capacity, as achieved by shorter stopping distances, would improve highway safety. *Id.* at 640. But as the court of appeals read the administrative record, mass production of ABS devices had revealed evidence of serious problems with the reliability of those devices, which should have led NHTSA to investigate "more fully the safety of vehicles in use." *Id.* at 642 (emphasis omitted). Since, according to the court of appeals, "antilock problems have appeared with usage rather than at the manufacturing stage,

[3] During the course of the rulemaking and in response to various petitions for reconsideration, NHTSA eliminated one stopping distance requirement from Standard 121 (36 Fed. Reg. 3817 (1971)), lengthened another stopping distance several times (*ibid.*; 39 Fed. Reg. 17,554 (1974); 41 Fed. Reg. 8786 (1976)), and modified the lockup regulations to permit "controlled" lockup of wheels allowed by an ABS device (37 Fed. Reg. 3905, 3908 (1972)). NHTSA also suspended the stopping distance and lockup regulations for buses because of erratic performance of ABS devices used in buses. 41 Fed. Reg. 1598 (1976). It eventually restored those regulations for intercity and transit buses, but not school buses. 43 Fed. Reg. 12,015 (1978). The regulations were later suspended again for all buses. 52 Fed. Reg. 20,602 (1987).

the * * * methods employed by NHTSA to examine the validity of complaints were inadequate." *Id.* at 643.

The court noted that, in vehicles manufactured with more powerful braking systems to meet the stopping distance requirements of Standard 121, the failure of ABS devices could result in a situation "more hazardous than the performance of pre-Standard vehicles." 573 F.2d at 643. Concluding that the record could not sustain NHTSA's decision to impose those stopping distance requirements without further investigation of the problems with ABS devices (which were effectively mandated to meet those requirements), the court held that, "until such time as NHTSA develops evidence that the new braking systems required by the Standard do not create the possibility of greater danger to the public, those parts of the Standard requiring * * * the antilock device should be suspended." *Ibid.*

NHTSA unsuccessfully petitioned for a writ of certiorari, arguing that the court had substituted its judgment for that of the agency on a Standard that was "an especially important part of NHTSA's attempt to reduce highway fatalities, [the] invalidation [of which] could lead to deaths and injuries that should be prevented." Pet. 14, *NHTSA* v. *Paccar, Inc.*, No. 78-95. After certiorari was denied (439 U.S. 862 (1978)), NHTSA amended Standard 121 in 1979 to state that the stopping distance and lockup requirements were "not applicable to trucks and trailers." 49 C.F.R. 571.121 S3; see 44 Fed. Reg. 46,849 (1979). NHTSA stated that it amended Standard 121 in that way, rather than repeal the sections affected by the court of appeals' decision, so that "the affected sections can most easily be reinstated when suitable solutions to the requirements laid down by the [court of appeals] are found." *Ibid.* NHTSA also left those provisions in place to make manufacturers "aware of what the agency still considers to be reasonable standards for minimum acceptable performance,

and those manufacturers that wish to construct their vehicles in accordance with the non-mandatory sections of the standard will have the necessary guidance to do so." *Ibid.*[4] Other aspects of braking performance governed by Standard 121, such as the brake actuation and release time rules, were unaffected by the *Paccar* decision and remain in effect for trucks and trailers. See *ibid.* (specifying suspended sections of Standard 121).

NHTSA has recently proposed new stopping distance and stability requirements for heavy vehicles using air brakes, and it has also proposed a requirement that those vehicles be equipped with ABS devices. See 58 Fed. Reg. 11,009 (1993); *id.* at 50,738. As yet, however, NHTSA has not taken final action on those proposals. Since Standard 121 was amended in 1979, therefore, there has been no federal motor vehicle safety standard in effect that imposes stopping distance or vehicle stability requirements on trucks and trailers or requires the use of ABS devices in those vehicles.

2. The issue in this case is whether either the Safety Act or Standard 121 (as amended in 1979 to exclude trucks and trailers from its stopping distance and stability requirements) preempts two state common law tort actions against heavy truck manufacturers. The Safety Act contains the following preemption provision:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. 1392(d). The Act also contains a saving clause, which provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. 1397(k).

3. Respondent Myrick was injured in an accident with a tractor-trailer combination vehicle, the truck-tractor of which was manufactured by petitioner Freightliner. Respondent Lindsey is the surviving spouse of Grace Lindsey, who was killed in a collision with a vehicle, the truck-tractor of which was manufactured by petitioner Navistar. Respondents filed independent state-court suits, which were removed to federal district court based on diversity jurisdiction. In both cases, respondents alleged that the vehicles' braking systems were defectively designed because the vehicles did not have an ABS device. Petitioners moved for summary judgment, contending that, because Standard 121, as amended in 1979, did not require their trucks to be equipped with ABS devices, respondents' actions are preempted. Pet. App. 2a-4a. In both cases, the district courts granted summary judgment for petitioners, holding that respondents' state common law design defect claims are impliedly preempted. *Id.* at 34a-42a, 46a-47a.

4. A divided court of appeals reversed. Pet. App. 1a-33a. Relying on prior circuit precedent, the court held that respondents' claims are not expressly preempted by the Safety Act. *Id.* at 10a-11a. The court reasoned that the saving clause in Section 1397(k) "plainly state[s]" that compliance with a safety standard does not exempt anyone from common law liability, and that the text of the preemption provision in Section 1392(d) does not in any event encompass state common law. *Id.* at 7a-8a.

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[4] NHTSA advised the public that "[u]sers are not required to disconnect antilock systems on vehicles in use, and may order antilock according to their choice on new vehicles," noting that it had uncovered no evidence that ABS components "installed contai[n] inherent problems that create a hazard to the public." 44 Fed. Reg. 9784 (1979).

The court also rejected petitioners' implied preemption argument. Pet. App. 9a-25a. Relying on this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the court concluded that, where a federal statute contains an express preemption clause, and where that clause constitutes a "reliable indicium of congressional intent with respect to state authority," a court should not consider theories of implied preemption. Pet. App. 9a-10a, 14a. The court expressed the view that "the reliable indicium requirement is not much of a hurdle," and that a presumption "that a preemption clause is a reliable indicium of congressional intent * * * is in keeping with the general rule of assuming that Congress intended what it said." *Id.* at 18a-19a. Relying on such a presumption, as well as the legislative history, the Court concluded that the preemption provisions of the Safety Act (including the clause preserving common law liability) are reliable indicia of congressional intent, and therefore foreclose an implied preemption claim.

Judge Hill dissented on the implied preemption issue. Pet. App. 25a-33a. He believed that "nothing in * * * *Cipollone* mandates that implied pre-emption is no longer viable in the face of an express pre-emption clause" (Pet. App. 28a), and that, because "this case involves only state law claims that impose legal duties predicated on subject matter squarely governed by federal regulations," analysis of implied preemption is permissible (*id.* at 30a). Judge Hill then concluded that respondents' claims are preempted because "[t]he assertion of state law claims which would forbid the manufacture of brakes expressly permitted by federal law is a

classic conflict where, under the Supremacy Clause, federal law must prevail." *Id.* at 32a.[5]

SUMMARY OF ARGUMENT

A. Respondents' claims are not expressly preempted by the Safety Act. The preemption provision, Section 1392(d), precludes the operation of non-identical state safety standards only when there is a federal safety standard "in effect" on the "same aspect of performance" that is the subject of a state safety standard. Since NHTSA amended Standard 121 in August 1979, there has been no federal standard "in effect" governing the subject of respondents' claims. Moreover, the text and structure of the Safety Act, taking the preemption provision, Section 1392(d), and the saving clause, Section 1397(k), in combination, demonstrate that the Safety Act does not expressly preempt judicial orders or duties of care imposed by the common law, but rather preserves manufacturers' tort liability under state law.

B. The court of appeals erred in concluding that, because the Safety Act contains an express preemption clause, petitioners' implied preemption argument is foreclosed. The existence of the express preemption clause should not bar inquiry into whether the asserted state common law duty of care underlying respondents' claims would actually conflict with federal law. On the merits of that implied preemption issue, however, the asserted common law duty does not conflict with either Standard 121 or the Safety Act. Neither the Ninth Circuit, in its *Paccar* decision, nor NHTSA, in amending Standard 121 following that decision, made the determination that truck manufacturers must have the unfettered option, as a matter of federal law, not to install

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[5] The apparent factual premise of Judge Hill's opinion—that air brakes and ABS devices are mutually exclusive, see Pet. App. 25a-27a—is incorrect. ABS devices enhance air brake systems; they do not replace them. See, *e.g.*, 36 Fed. Reg. 3817 (1971); 57 Fed. Reg. 24,212 (1992).

ABS devices on their vehicles. Petitioners can comply with both Standard 121 and a state common law duty obligating them to install ABS devices, and, because NHTSA has not concluded that ABS devices disserve safety, such a common law duty would not interfere with the objectives of any federal motor vehicle safety standard. Nothing in the Safety Act itself prevents the installation of ABS devices, and, because Congress provided room for the operation of state tort law in the Safety Act, the state common law duty alleged by respondents would not conflict with Congress's chosen methods in the Act of promoting safety.

ARGUMENT

RESPONDENTS' CLAIMS ARE NOT PREEMPTED BY EITHER THE SAFETY ACT OR STANDARD 121

A. Respondents' Claims Are Not Expressly Preempted By The Safety Act

Petitioners contend that respondents' claims are expressly preempted by 15 U.S.C. 1392(d), the Safety Act's preemption provision, and that those claims are not saved by 15 U.S.C. 1397(k), which expressly preserves common law liability of manufacturers, notwithstanding compliance with federal safety standards. Petitioners' express preemption argument has two essential components. First, they argue that the Safety Act preempts state law concerning ABS devices because there currently is a federal standard in effect with respect to such devices. See Pet. Br. 31-32. Second, they argue that duties of care imposed by common law tort liability fall within the preemptive reach of the Safety Act. Pet. Br. 32-33. Both contentions are incorrect.

1. Section 1392(d) provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

A prerequisite to petitioners' preemption argument under this provision is that a federal standard is "in effect" with respect to ABS devices for trucks and trailers.

While numerous provisions of Standard 121 are in force, since August 9, 1979, there has been no federal safety standard established under the Safety Act "in effect" with regard to stopping distances or vehicle stability (the relevant "aspect[s] of performance") for trucks and trailers, including the trucks involved in these cases.[6] Moreover, no NHTSA standard in effect requires the installation of ABS devices (the relevant "item of equipment") in trucks and trailers. The States are therefore free, under Section 1392(d), to establish or to continue in effect their own safety standards applicable to those "aspect[s] of performance" and that "item of equipment."

Petitioners contend, however (Pet. Br. 31-32), that Congress intended the preemptive reach of federal safety standards to be broad, and that an "aspect of performance" is defined by both the affirmative obligations imposed by a standard and the exclusions from those obligations. The scope of the Safety Act's preemption provision is significantly narrower than petitioners suggest. The Act defines a "motor vehicle safety standard" to mean "a minimum standard for

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[6] The *Paccar* decision did not invalidate Standard 121 with regard to buses. 573 F.2d at 634 n.1; see 44 Fed. Reg. 46,849 (1979). However, NHTSA suspended the stopping distance requirements of Standard 121 for buses in 1987 (52 Fed. Reg. 20,602), and since then, those aspects of the Standard have not been applicable to any vehicles. See 58 Fed. Reg. 11,010 (1993). Parts of Standard 121 relevant to other "aspects of performance," such as brake actuation and release time, do remain "in effect." See page 3, *supra*.

motor vehicle performance, or motor vehicle equipment performance," that, *inter alia*, "provides objective criteria." 15 U.S.C. 1391(2); see also 15 U.S.C. 1392(a). Nothing in Standard 121 establishes a "minimum standard," stated in "objective criteria," for ABS devices, or for stopping distances and vehicle stability, in trucks and trailers. To the contrary, the relevant provisions of Standard 121 are expressly inapplicable to trucks and trailers. Thus, petitioners' contention that the relevant aspects of Standard 121 are "in effect" for trucks and trailers even though (indeed because) those vehicles are expressly exempted from its coverage is contrary, not only to common usage, but also to the text of the Act.

The express preemption question in this case is the same as if NHTSA had never commenced rulemaking proceedings concerning stopping distances or vehicle stability at all, or had done so only with respect to buses. It could not seriously be contended that a federal safety standard applicable only to braking systems in buses preempted state standards applicable to braking systems in trucks and trailers. That is so because, when a federal standard is in effect under the Act, a State is barred only from establishing "any safety standard applicable to the *same* aspect of performance of *such vehicle or item of equipment*." 15 U.S.C. 1392(d) (emphasis added). The fact that NHTSA did go through rulemaking that included braking systems in trucks and trailers but ultimately excluded them from coverage of the relevant provisions of Standard 121 does not alter the legal analysis.[7]

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[7] Because Section 1392(d) applies only when a State seeks to enforce a standard "applicable to the same aspect of performance" for which a federal standard is in effect, it does not apply here simply because state law might be said to relate to, or touch upon, vehicles or equipment that are mentioned in but left unregulated by the federal standard. Cf. *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1738 (1993) (preemption provision ousting state regulations where Secretary of Transportation has adopted a regulation or order "covering" the subject matter of the state requirement construed narrowly to apply only when "the federal regulations substantially subsume the subject matter of the relevant state law"); compare *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) (preemption clause's use of "relating to" has broad preemptive effect).

2. a. Petitioners' express preemption argument would be without merit even if the relevant requirements of Standard 121 were applicable to trucks and trailers, because the preemption provisions of the Safety Act do not in any event immunize manufacturers who comply with NHTSA standards from liability at common law. Petitioners argue that, in preempting any state "safety standard," Congress intended to preempt liability arising from state tort law. We acknowledge that the term "standard," standing alone, may be ambiguous on that point. The common law of torts is sometimes described in general terms as articulating a "standard of care" to be applied on a case-by-case basis to assess a defendant's conduct and fault. See S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966); cf. *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1737-1738 (1993) (legal duties imposed by common law fall within scope of "law, rule, regulation, order, or standard relating to railroad safety"); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959). But the term "standard" may also connote a more definite and independently ascertainable criterion, prescribed in advance by responsible authorities.[8] That connotation would not ordinarily be thought to include duties of care that derive from the process of common law adjudication.

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[8] See *Webster's Third New International Dictionary* 2223 (1986) (def. 3a: "something that is established by authority, custom, or general consent as a model or example to be followed"; def. 7b: "carefully drawn specifications covering manufacturing material or equipment"); *The Random House Dictionary of the English Language* 1857 (2d ed. 1987) (def. 1: "something considered by an authority or by general consent as a basis of comparison; an approved model").

Moreover, unlike the statute at issue in *CSX*, which preempted any relevant "law, rule, regulation, order, or standard" (113 S. Ct. at 1737), thus reaching virtually every method by which a State can impose legal obligations, or the statute at issue in *Cipollone*, which used the sweeping term "requirement" (112 S. Ct. at 2620), the Safety Act preempts only "safety standard[s]" (15 U.S.C. 1392(d)), not all "orders" or "requirements." The statute's reference to a State's "establish[ing]" or "continu[ing] in effect" any "safety standard" (*ibid.*) also suggests a prescriptive rule affirmatively promulgated by a legislative or administrative body. That is especially so since Section 1392(d) uses directly parallel terminology in describing the standards prescribed by NHTSA: The predicate for preemption is that "a Federal motor vehicle safety standard established under [the Safety Act] is in effect," and even then nothing bars "any State from enforcing any safety standard which is identical to a Federal safety standard." See also 15 U.S.C. 1391(2) (defining "motor vehicle safety standard" as a "minimum standard" of "performance").

b. Any ambiguity on the preemption issue that may be present in Section 1392(d) standing alone is resolved by reference to Section 1397(k), which provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Under the plain meaning of that provision, even if a federal motor vehicle safety standard were in effect with respect to ABS devices on trucks and trailers and petitioners had complied with that standard, their compliance would not immunize them from common law liability. The legislative history of Section 1397(k), which originated in the House of Representatives, confirms that Congress intended that manufacturers could be held liable in tort, even if their vehicles complied with all relevant federal safety standards. See H.R. Rep. No. 1776, 89th Cong., 2d Sess.

24 (1966) ("compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law, particularly those relating to warranty, contract, and tort liability"); 112 Cong. Rec. 21,487 (1966) (Sen. Magnuson) (stating that Senate accepted House provision, and observing that "it makes explicit, in the bill, a principle developed in the Senate report").[9] There is no indication that Congress intended Section 1397(k) to have a limited scope in preserving common law liability—by, for example, restricting its reach to aspects of performance that were *not* covered by federal standards. See Pet. Br. 29 (noting that petitioners did not raise that argument below). The statutory language, preserving "any liability" under common law, precludes that

[9] The version of the Safety Act originally passed by the Senate included a preemption clause similar to the one eventually enacted, but did not include a provision expressly preserving common law liability. See 112 Cong. Rec. 14,214-14,219 (1966). The Senate report nevertheless stated that "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, *supra*, at 12. Senator Magnuson, the floor manager, similarly stated that "[c]ompliance with Federal standards would not necessarily shield any person from broad liability at the common law. The common law on product liability still remains as it was." 112 Cong. Rec. 14,230 (1966). The statements that compliance with federal standards would not "necessarily" shield any person from liability may well have been based on the view that a court or jury in a tort suit would be free to take the defendant's compliance with the federal minimum standard into account in determining whether the defendant acted reasonably or otherwise satisfied the applicable duty of care under the common law. This conclusion is reinforced by the statements during consideration of the conference report in the Senate that Section 1397(k) "does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards," 112 Cong. Rec. 21,487 (1966) (Sen. Magnuson), and that "proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it," *id.* at 21,490 (Sen. Cotton).

reading of Section 1397(k). See also *Taylor* v. *General Motors Corp.*, 875 F.2d 816, 824-825 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990), discussed at Pet. App. 7a-8a.

Thus, under a straightforward reading of Section 1392(d) and Section 1397(k), taken together, States are preempted from adopting prescriptive safety standards by legislative or administrative action if NHTSA has established a safety standard governing the same aspect of performance. See also 108 Stat. 943 (codifying new preemption provision, 49 U.S.C. 30103 (b), which states that, when a federal standard is in effect, a State may "prescribe or continue in effect" a standard only if identical to the federal standard "prescribed" under the Safety Act). State courts, however, are not precluded by those provisions from entering tort judgments in cases raising the claim that a vehicle or item of equipment was defectively designed with respect to that same aspect of performance.[10]

Petitioners argue (Pet. Br. 35-36), however, that a general statutory saving clause must not be read to unravel the legislative purpose embodied in the rest of a federal statute, including its preemption provision. That proposition is not relevant to this case, for two reasons. First, Section 1397(k) is not a general saving clause, but is focused precisely on only

[10] NHTSA has long taken that view. In a January 5, 1981, letter from Frank Berndt, Chief Counsel of NHTSA, to counsel for one of the parties in *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981), NHTSA stated that, under Section 1397(k), compliance with a federal standard does not provide a defense under federal law to a products liability action. On December 26, 1990, NHTSA reiterated its position, in a letter from its Chief Counsel, Paul Jackson Rice, to counsel for one of the parties in *Neilson* v. *Porsche*, No. 87-1121 (D. Idaho), that, "as a general matter, the fact that a motor vehicle complies with applicable federal safety standards neither preempts state law tort actions nor provides a complete defense to such claims." See also U.S. Amicus Br. 15, *Wood* v. *General Motors Corp.*, No. 89-46. We are providing counsel for the parties with copies of those letters and our brief in *Wood*. We also are lodging copies of the letters with the Clerk of this Court.

one object of possible preemption under the Safety Act, common law liability. This is not a case, therefore, where it is argued that "[a] general 'remedies' saving clause * * * supersede[s] the specific substantive pre-emption provision." *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992). Here, the narrower provision is the saving clause, Section 1397(k), which specifically addresses the interaction of compliance with federal safety standards and liability at common law; that clause controls the more general preemption provision, Section 1392(d)—even if we assume, *arguendo*, that Section 1392(d) otherwise would, in itself, preempt a state common law cause of action (see pages 13-14, *supra*).

Second, there is no danger that our reading of Section 1397(k) will "undermine this carefully drawn statute." *Morales*, 112 S. Ct. at 2037. Congress enacted the two sections at the same time and obviously perceived that they could operate harmoniously. Cf. *ibid.* (specific preemption clause at issue in *Morales* was enacted years after general saving provision). Congress enacted Section 1392(d) to assure manufacturers that they would not have to conform their fleets to different and possibly conflicting standards mandated by States and local jurisdictions. At the same time, it is clear that Congress did not elevate uniformity to an absolute value in the Act. For example, Congress provided that mandatory federal safety standards are only "minimum standard[s]," 15 U.S.C. 1391(2), and it interposed no barrier to manufacturers' exceeding those standards voluntarily, either nationwide or in particular States.

Admittedly, Section 1397(k), by preserving tort claims against manufacturers who meet federal safety standards, creates some tension within the Safety Act, since the Act also prevents States from directly prescribing safety standards stricter than the standards prescribed by NHTSA. It is therefore possible that a State's judicial system could in-

directly impose a common law "standard" of care on a vehicle manufacturer that a state legislature or administrative agency could not impose directly through the promulgation of "safety standards." Congress nevertheless decided to tolerate that tension, in a compromise between the federal interest in uniformity and the States' traditional interest in compensating victims of motor vehicle accidents, an area in which the States have long measured defendants' conduct against standards of care articulated in the common law adjudication of tort claims.

Congress may have believed that any effect that state tort liability might have on manufacturers' decisions to institute safety measures beyond those required by federal law would be less disruptive of the federal interest in uniformity than positive performance standards adopted by state legislatures or administrative agencies; it may also have believed that state tort law should be permitted to impose liability on a particular manufacturer for failure to include a particular safety feature on a particular model, even if a State could not impose a uniform standard applicable to all vehicles sold or operated in the State. In short, Congress could "reasonably determine that incidental regulatory pressure [of tort liability was] acceptable, whereas direct regulatory authority [was] not," *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 186 (1988), and the courts "can do no less." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

B. Respondents' Claims Are Not Impliedly Preempted By Either The Safety Act Or Standard 121

Petitioners also challenge the court of appeals' holding that respondents' tort claims are not impliedly preempted by either the Safety Act or Standard 121. Although we do not agree with the court of appeals' reasoning, we do agree with its holding.

1. a. Under this Court's settled preemption jurisprudence, state law is preempted "in three circumstances":

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. * * * Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. * * * Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements * * * or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citations omitted).

The court of appeals nevertheless believed that, because the Safety Act contains an express preemption provision that it found (on the basis of a presumption and legislative history) to be a "reliable indicium" of Congress's preemptive intent, this Court's decision in *Cipollone* precluded any inquiry into the implied preemption of respondents' claims by the Safety Act or Standard 121. See Pet. App. 11a. Although there is language in the *Cipollone* opinion supporting the court of appeals' view, see 112 S. Ct. at 2618, we agree with petitioners that the existence of an express preemption provision should not, in itself, preclude all further inquiry into implied preemption, at least insofar as the question is whether state law "actually conflicts with federal law." See *English*, 496 U.S. at 79.

Although Congress, when it enacts a statute, may survey the statute's intended reach and attempt to identify the field in which state authority should or should not be ousted, it is unrealistic to expect that Congress will foresee all the

possible ways in which the States might adopt measures in the future that would bear upon the federal scheme. That is particularly true when Congress enacts a statute, like the Safety Act (but unlike the statute at issue in *Cipollone*), that takes effect through administrative action. In the Safety Act, Congress delegated standard-setting authority to the Secretary of Transportation and identified principles governing the exercise of that authority; it did not prescribe any safety standards itself, nor did it review the technical evidence concerning specific areas to be regulated by the Secretary. Thus, Congress could not know exactly how federal law would take shape as a result of the administrative process, and it could not predict whether or how States might adopt conflicting measures in the future.[11]

While it is often said that the ultimate touchstone of preemption analysis is Congress's intent (see, *e.g.*, *Cipollone*, 112 S. Ct. at 2617; *English*, 496 U.S. at 78-79), conflict preemption arises directly from the operation of the Supremacy Clause (U.S. Const. Art. VI, Cl. 2), rather than from a specific

[11] The court of appeals' analysis may have greater force with respect to implied *field* preemption, *i.e.*, where, even "in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 496 U.S. at 79. In such situations, the "existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines." *Cipollone*, 112 S. Ct. at 2633 (Scalia, J., concurring in the judgment in part and dissenting in part). Implied field preemption rests less on the conclusion that state law actually conflicts with federal law in specific ways than on an inference, from the pervasiveness of the federal regulatory scheme, the need for uniformity, or the inherent federal nature of the subject matter, that Congress must have intended to leave "no room for the States to supplement it." *English*, 496 U.S. at 79. In the case at bar, no claim is made that Congress occupied the field of motor vehicle safety. See, *e.g.*, 15 U.S.C. 1392(d) (States may enforce standards identical to the federal standards).

intent on the part of Congress to displace state law. Thus, "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963). Similarly, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" may be impliedly preempted by a federal statute, even in the absence of any expression of congressional intent to supersede state law-making authority, and even if the state law does not fall within the scope of an express preemption provision in the statute. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-543 (1977). While implied preemption does require consideration of Congress's intent to the extent of ascertaining the purposes that Congress sought to achieve (and that might be impeded by state law), it does not depend on a specific, affirmative intent by Congress to supersede conflicting state law.

Because Congress enacts laws against the background of the Supremacy Clause, it must be assumed to believe that federal law will prevail in any collision with state law. The reverse presumption adopted by the court of appeals—that Congress's enactment of an express preemption provision indicates that it otherwise intended for state law to prevail—seems especially odd, for preemption provisions are usually intended to give effect to, not to restrict the effect of, the supremacy of federal legislation. Congress is free to allow state law to operate in the place of conflicting federal law, but we agree with petitioners that it should not be presumed to have done so.

This Court did not elaborate in *Cipollone* on what it meant by a "reliable indicium" of congressional intent, and the statement has already become a prolific breeder of litigation as parties attempt to show that an express statutory provision

is, or is not, such a reliable indicium. See Pet. App. 18a-19a (collecting cases). The passage in *Cipollone* was derived from two earlier decisions, *Malone* v. *White Motor Corp.*, 435 U.S. 497, 505 (1978), and *California Federal Savings & Loan Association* v. *Guerra*, 479 U.S. 272, 282 (1987) (plurality opinion of Marshall, J.). Neither decision, however, stands for the proposition that an express preemption clause moots inquiry into conflict preemption.

In *Malone*, the issue was essentially one of field preemption: whether a state statute regulating pension plans "trenched on * * * subjects that Congress had committed for determination to the collective-bargaining process." 435 U.S. at 504. The Court noted that the relevant federal statutes did not "expressly foreclos[e] all state regulatory power" with respect to issues that might be the subject of collective bargaining, *ibid.*, and so it observed that any congressional intent to preempt "must be *implied* from the relevant provisions of the * * * statutes," *id.* at 505. The Court was referring, however, to "implying" (or inferring) a congressional intent to oust state law from sources such as other sections of the statutes and their structure and legislative history; it was not referring to "implied" preemption of state laws that actually conflict with federal law. Moreover, the Court found the "reliable indicium" of congressional intent with respect to state authority, not in a preemption clause (which the statutes did not contain), but in a saving provision. *Ibid.* *Malone* therefore stands only for the proposition that a statute containing a saving clause but not a preemption clause can reliably indicate Congress's intent *not* to require broad preemption of state law.

In *Guerra*, the plurality concluded that the text of the saving provision of Title VII of the Civil Rights Act of 1964 furnished a reliable indicium of congressional intent to *preserve* all state laws *except* those that actually conflict with federal law. The Court accordingly held that there was no

need to "infer congressional intent to pre-empt state laws" from other provisions of Title VII. 479 U.S. at 282; see also *id.* at 295 (Scalia, J., concurring in the judgment) (noting that sections relied on by plurality were "*antipre-emption* provisions").

Against this background, we do not believe that *Cipollone* should be read to have announced a general rule that an express preemption clause, by itself, reliably or presumptively indicates an intent by Congress to tolerate conflicts between state and federal law.[12] Federal statutes vary widely in their terms and contexts, as well as the ways in which they interact with state law; that variety cautions against generalizations about Congress's preemptive intent. We agree with the court of appeals that courts should presume that Congress intended what it said in a statute's express preemption clause. Pet. App. 19a. But courts should also be free to employ all the traditional tools of construction in determining whether state law is preempted with respect to matters *not* covered by the express preemption clause. Thus, the reference in *Cipollone* to whether the preemption clause is a "reliable indicium of congressional intent" should be understood to mean that the traditional tools of construction with respect to the latter issue should include consideration of the express preemption clause, but not to the exclusion of other features of the statutory scheme, its legislative history, and actual conflict between state and federal law.

b. Moreover, implied conflict preemption by federal law is not confined to federal statutes. In this case, it is also necessary to determine whether state law is impliedly preempted by NHTSA's implementation of the Safety Act

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[12] Since *Cipollone*, this Court has undertaken implied preemption analysis even in cases involving an express preemption provision. See *CSX*, 113 S. Ct. at 1742 n.12; *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Savings Bank*, 114 S. Ct. 517, 526 (1993). The same was true prior to *Cipollone*. See, *e.g.*, *Rath Packing*, 430 U.S. at 540, 543.

through issuance of a particular federal standard. Whether or not Congress has enacted a statutory preemption provision, state laws are impliedly preempted by federal regulations to the extent that they actually conflict with those regulations, or stand as an obstacle to the accomplishment and execution of the federal regulatory scheme. "The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988); see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 706 (1984). Therefore, whatever the force of the court of appeals' reading of *Cipollone* where the only implied preemption claim is that state law conflicts with a federal statute, in a case where, as here, "state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'" *City of New York*, 486 U.S. at 64 (citation omitted).

2. a. Although we believe that the court of appeals should not have pretermitted its inquiry into implied preemption, we agree with its ultimate conclusion that respondents' claims are not impliedly preempted. Respondents' tort claims clearly are not impliedly preempted by the Safety Act itself, since nothing in the Act itself regulates the use of ABS devices. Nor would a finding of liability on respondents' claims stand as an obstacle to the full accomplishment of Congress's objectives in enacting the Safety Act. While a state law may be impliedly preempted "if it interferes with the methods by which the federal statute was designed to reach [its] goal," *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987), here, Congress's chosen methods of increasing automotive safety include both the establishment of federal minimum standards and the preservation of common law tort liability on

the part of even those manufacturers that comply with those standards.

b. Nor are respondents' claims impliedly preempted by Standard 121. Underlying petitioners' submission to the contrary is a premise with which we fundamentally disagree. Petitioners contend that the Ninth Circuit's decision vacating the stopping distance and stability requirements of Standard 121 as applied to trucks and trailers, or NHTSA's 1979 amendment of the Standard following the court's order, "effectively gave the manufacturers the option [under federal law] of not installing [an ABS] device." Pet. App. 10a; see Pet. Br. 11, 14, 16. Thus, they argue that any state law that forecloses that "option" must be preempted. In fact, neither NHTSA nor the Ninth Circuit determined that ABS devices are inherently unsafe or that the Safety Act requires that a manufacturer have the unfettered option not to install them. Because there has been no such federal determination, a state law claim based on the failure to install an ABS device would not conflict with federal law; the Court need not address how the implied preemption issue might be resolved in a case in which NHTSA had made such a determination.

i. The Ninth Circuit did not affirmatively determine in *Paccar* that ABS devices would present an unreasonable risk to safety. Rather, applying either the "substantial evidence" or "arbitrary and capricious" standard of review to NHTSA's rulemaking record, 573 F.2d at 636 (see *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 44 (1983)), the Ninth Circuit concluded only that NHTSA had erred by failing to take into account at that time evidence of serious safety problems presented by mass production of ABS devices, and by limiting its review of the evidence to the performance of ABS devices at the manufacturing stage. Thus, while the court set aside the provisions of Standard 121 that would have required installation of ABS devices in trucks and trailers until NHTSA undertook a more thorough review

of the evidence, it did not direct NHTSA to promulgate a standard prohibiting installation of ABS devices or preclude NHTSA from concluding, after further review (or after subsequent technological advances), that ABS devices should be required, either directly or indirectly through the imposition of braking performance criteria.[13] The court made clear that "[t]he agency may, of course, continue to propose new standards, including the promulgation of new stopping distance requirements to replace those here invalidated," and that it held "only that more pro[b]ative and convincing data evidencing the reliability and safety of vehicles that are equipped with [ABS devices] and in use must be available before the agency can enforce a standard requiring [their] installation." 573 F.2d at 643.[14]

ii. NHTSA likewise has never concluded that installation of ABS devices by truck manufacturers would contravene the purposes of the Safety Act, or that manufacturers who choose the "option" of not installing such devices should be protected from the consequences of that choice. The court of appeals' vacatur of Standard 121 left a regulatory gap in the area of stopping distances that NHTSA has not yet filled; the

[13] Any such order would have exceeded the proper scope of judicial review. See *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); see also *State Farm*, 463 U.S. at 57 n.21.

[14] Even if the Ninth Circuit had made an affirmative determination on the administrative record before it in 1978 that ABS devices presented a sufficient risk to safety that they should not be mandated on a nationwide basis, such a ruling could not preclude a trial court or jury in a private tort suit (presumably brought by plaintiffs who were not parties to the judicial review of NHTSA's standard) from finding that it was unreasonable for an ABS device not to have been installed on a particular vehicle. Nor would it bar the court or jury in such a suit from concluding that technology and other circumstances had sufficiently evolved since 1978 that it had become unreasonable for the manufacturer not to install ABS devices on trucks built in later years.

situation therefore is the same as if NHTSA had never instituted rulemaking concerning stopping distances for trucks and trailers, or had done so but never issued any standard. In such a situation, respondents' claims would not be impliedly preempted:

> In [some] cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. * * * [And] where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation[.] The states are in those cases permitted to use their police power in the interval.

Bethlehem Steel Co. v. *New York State Labor Relations Bd.*, 330 U.S. 767, 773-774 (1947) (citations omitted).

Petitioners suggest (Pet. Br. 32) that this case is more analogous to one in which the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." See *Bethlehem Steel*, 330 U.S. at 774. NHTSA, however, has not made any such determination about ABS devices in trucks and trailers. To the contrary, NHTSA explained when it amended Standard 121 in 1979 that ABS devices promote safety; it has encouraged manufacturers to install them; and it has given manufacturers guidance as to "reasonable standards for minimum acceptable performance" for ABS devices. 44 Fed.

Reg. 46,849 (1979). NHTSA also declined, after the *Paccar* decision, to order the removal of ABS devices from trucks and trailers manufactured to meet Standard 121. 43 Fed. Reg. 48,647 (1978). NHTSA in fact is of the view that "ABS are very effective in providing short stable stops in all operating conditions," 58 Fed. Reg. 11,012 (1993), and it currently estimates that "the use of ABS on all heavy vehicles would help prevent between 379 and 600 fatalities, [and] between 19,825 and 34,517 injuries [annually]," *id.* at 50,754.[15]

NHTSA's support for ABS devices can be contrasted to its findings, in the 1984 version of Standard 208, 49 C.F.R. 571.208, concerning installation of airbags in passenger vehicles. In promulgating that Standard, the Secretary concluded that, because of a history of substantial consumer resistance to automatic, or passive, occupant restraint systems, passenger safety would be best served by a diversity of such restraint systems, including but not limited to airbags, which would promote public acceptance of passive restraints. The Secretary explicitly determined that an all-airbag rule would have disserved the safety purposes of the Act. See 49 Fed. Reg. 29,001 (1984). As we explained in our *amicus curiae* brief in *Wood* v. *General Motors Corp.*, No. 89-46, common law tort actions that imposed liability for failure to install airbags (as opposed to other types of passive restraint devices) could, as a practical matter, have compelled manufacturers to install airbags in all their new vehicles. Because such a result would have frustrated the Secretary's policy judgment and would have had an adverse effect on safety, we argued in *Wood* (U.S. Amicus Br. 11-15) that such suits were preempted.[16] Interference with that federally

[15] The United States takes no position on the merits of respondents' specific claims that petitioners' failure to install ABS devices violated a common law duty of care.

[16] Although the majority of courts to have considered the question have concluded that "no-airbags" suits are preempted, they have done so on a broader theory of implied preemption with which the United States does not agree, *i.e.*, that the existence of "options" to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option. See, *e.g.*, *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990); *Taylor* v. *General Motors Corp.*, *supra*; *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990). In response to legislation (see NHTSA Authorization Act of 1991, Pub. L. No. 102-240, Tit. II, Pt. B, § 2508, 105 Stat. 2084), NHTSA has recently amended Standard 208 to require that all cars manufactured on or after September 1, 1997, and all light trucks manufactured on or after September 1, 1998, be equipped with airbags in the driver's and front outboard passenger's seats. 58 Fed. Reg. 46,551 (1993).

protected freedom of choice through state tort judgments would have conflicted with Standard 208. Compare *Building & Construction Trades Council* v. *Associated Builders & Contractors*, 113 S. Ct. 1190, 1194-1195 (1993).

NHTSA has taken no analogous regulatory step through Standard 121 in the area of ABS devices.[17] Indeed, at present there is no federal motor vehicle safety standard in effect at all requiring ABS devices or imposing stopping distances for trucks and trailers that use air brakes. Respondents' tort claims therefore do not conflict with Standard 121. Compliance with both Standard 121 and a state law duty of care requiring installation of ABS devices would not be a physical impossibility, since nothing in Standard 121 prevents manufacturers from installing such devices.[18] Nor would

[17] NHTSA's construction of Standard 121, including that it confers no federally protected right to choose whether or not to install ABS devices that must in turn be free from the incidental effect of common law tort suits, is entitled to substantial deference. *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2386-2387 (1994); *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988).

[18] As we pointed out in *Wood* (U.S. Amicus Br. 11), there may be situations in which it would be impossible for a manufacturer to comply with both a state common law duty of care and a federal standard. If, for

state tort liability stand as an obstacle to the full accomplishment of the purposes of Standard 121, since that Standard does not reflect any determination by NHTSA that installation of ABS devices would be contrary to the safety objectives of the Act. NHTSA has consistently held the view that ABS devices promote passenger safety, even though there is no regulation in effect requiring those devices. Because "the Secretary has [n]either promulgated his own * * * requirement * * * [nor] decided that no such requirement should be imposed at all," *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 171-172 (1978), NHTSA's 1979 amendment of Standard 121 does not preempt respondents' claims.

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example, NHTSA determined that a particular item of equipment must have precise specifications to accommodate competing goals (*e.g.*, a headrest that is large enough to protect the driver but not so large as to obscure his view), a common law duty of care requiring the installation of a larger (or smaller) headrest could directly conflict with the federal requirements and be preempted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1994

Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

No. 94-286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surving Spouse of Grace C. Lindsey,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-286

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and
Surving Spouse of Grace C. Lindsey,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE TRUCK TRAILER MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The Truck Trailer Manufacturers Association ("TTMA") respectfully submits this brief *amicus curiae* in support of the petitioners in this case. Letters reflecting the consent of all parties to the filing of this brief have been obtained and delivered to the Court.

TTMA is an organization whose members manufacture large truck and tractor pulled trailers or supply these manufacturers with materials, components and services. TTMA members manufacture over 90% of the total production in the United States of truck trailers, tank trailers, cargo containers, cargo tanks for trucks, and container chassis. More than 200,000 such vehicles will be manufactured in 1994. TTMA membership also includes trailer manufacturers and suppliers in Canada and Europe whose products are sold for use in the United States.

The trailers manufactured by TTMA members are the subject of extensive regulation by the National Highway Traffic Safety Administration ("NHTSA"), which has issued hundreds of safety standards governing the design, manufacture and performance of trailers used in interstate commerce. These standards have been promulgated pursuant to 15 U.S.C. § 1392, the enabling statute under review in this case.[1] With respect to each safety standard, the issue of federal preemption and the need for consistent rulings throughout the United States are of paramount importance to TTMA members.

This case will determine whether TTMA members can rely on NHTSA safety standards (which they must follow) to ensure national uniformity for interstate transportation, as envisioned by Congress and where required by NHTSA, or whether disparate jury verdicts assigning State common law liability will be permitted, even where these verdicts conflict directly with NHTSA safety standards.

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[1] At all times material to this lawsuit, the Safety Act was codified at 49 U.S.C. § 1381 *et seq.* The Act was recently recodified without substantive change at 49 U.S.C. § 30101 *et seq.* To promote ease of reference to the record in this case and to the lower court decisions, TTMA will utilize the section numbers from the prior codification.

SUMMARY OF ARGUMENT

The National Traffic and Motor Safety Act defines Federal safety standards in terms identical to traditional standards utilized under State common law to determine liability for negligent or defective product design or manufacture. Federal safety standards must be objective, reasonable, practicable and appropriate in light of the available safety technology. 15 U.S.C. §§ 1391, & 1392. Common law negligence and strict liability claims require proof of unreasonable conduct or dangerous conditions, objectively measured, as well as alternative feasible, safer technology.

In promulgating Motor Vehicle Safety Standard No. 121, the National Highway Traffic Safety Administration has found—as a matter of Federal law—that the use of air brakes without antilock devices on large trucks and trailers is reasonable and safe. Installing air brakes without antilock devices fully satisfies Standard No. 121. 49 C.F.R. § 571.121. This finding has also been judicially determined. In *Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632, 643 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), the Court prohibited enforcement of a Federal safety standard requiring the use of antilock devices on large trucks and trailers.

Nonetheless, Respondents demand that State common law juries be allowed to find—as a matter of State law—that the use of air brakes without antilock devices is unreasonable and unsafe. Such a finding would in practice require installation of antilock devices on all trucks and trailers used in that State and would deprive manufacturers of their option under Standard No. 121 not to install such devices. It would therefore conflict with the Federal safety standard and the *Paccar* decision, and would undermine the methods NHTSA has established for achieving vehicle safety after consideration of available technology, relative risks and practicable alternatives.

The Supremacy Clause mandates preemption of conflicting State law. U.S. Const. Art. VI, cl. 2. The

Safety Act expressly preempts conflicting State law: No State shall have any authority to establish or continue in effect any safety standard which is "not identical" to the Federal standard. 15 U.S.C. § 1392(d). Even assuming that the Safety Act's so-called "savings clause" addresses the issue of Federal preemption, it simply preserves State common law that does not conflict with Federal safety standards. 15 U.S.C. § 1397(k). The clause evidences congressional intent not to impliedly preempt the entire field of motor vehicle safety regulations. It is consistent with the preemption clause and does not undermine a finding of express preemption in this case.

Congress has assigned responsibility for modifying Federal safety standards to NHTSA. 15 U.S.C. § 1392(e) If NHTSA should modify a particular Federal standard, it must do so for the same reasons a State common law jury would impose liability under a different standard. To ensure nationwide uniformity of NHTSA standards, the Court should not arrogate to State common law juries the authority Congress has assigned to NHTSA under the Safety Act.

ARGUMENT

Congress enacted the National Traffic and Motor Safety Act in 1966 to protect "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and . . . against unreasonable risk of death or injury to persons in the event accidents do occur. . . ." 15 U.S.C. § 1391(1). The Safety Act authorized the Secretary of Transportation to promulgate Federal motor vehicle safety standards having nationwide application. 15 U.S.C. § 1392(a). Under the Secretary's direction, the National Highway Traffic Safety Administration ("NHTSA") has issued hundreds of such standards governing the design, manufacture and performance of motor vehicles, including conventional truck trailers and other special use cargo tanks and trailers. *See* 49 C.F.R. § 571.1 *et seq.*

The Safety Act defines Federal safety standards in terms identical to traditional standards utilized under State common law to determine liability for negligent or defective product design or manufacture. NHTSA is to protect against "unreasonable" risks of accidents, injury or death. 15 U.S.C. § 1391(1). Each NHTSA safety standard must be "practicable" and provide "objective criteria" in meeting the need for such safety. 15 U.S.C. §§ 1391(2) & 1392(a). NHTSA must consider whether proposed safety standards are "reasonable," "practicable" and "appropriate." 15 U.S.C. § 1392 (f)(3). Common law negligence rests on similar standards of reasonableness, objectively measured. Strict liability requires proof of a defective product creating an unreasonably dangerous condition, as well as a feasible alternative design or manufacturing process that does not create this dangerous condition. The parallel between the governing criteria for NHTSA safety standards and State common law liability reveals the inherent potential for conflicts between the Federal standards and State common law jury verdicts that impose liability on manufacturers based on differing assessments of what is reasonable and practicable. Where those assessments conflict, the Supremacy Clause and the express terms of the Safety Act mandate that the Federal standards prevail.

This case will clarify the scope of preemption afforded motor vehicle safety standards promulgated by NHTSA, and particularly the effect of those standards on State common law tort claims alleging negligent or defective product design or manufacture. In this brief, TTMA will outline its position on the preemption issue and will urge the Court to adopt a straightforward express preemption analysis. TTMA will also address, by way of example, the potential effect of the Court's ruling on NHTSA safety standards other than Standard No. 121, which regulates the air brake systems and antilock devices at issue in this case.

I. THE SAFETY ACT EXPRESSLY PREEMPTS STATE COMMON LAW CLAIMS WHICH ATTEMPT TO IMPOSE LIABILITY UNDER STANDARDS THAT CONFLICT WITH FEDERAL MOTOR VEHICLE SAFETY STANDARDS.

In the decision of the Court of Appeals below and in the petition for a writ of certiorari, response and other *amicus curiae* briefs filed in this Court, considerable analysis is offered regarding this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), and the statement in the plurality opinion in that case that courts should not consider implied preemption theories where a statute contains an express preemption clause that provides a "reliable indicium of congressional intent with respect to state authority." *Id.* at 2618. The focus of this analysis is whether the Safety Act in fact reliably indicates Congressional intent regarding the preemption of State common law claims and, if not, whether the applicable Federal and State standards conflict such that a finding of implied preemption is warranted.

While TTMA endorses, as a secondary position, the arguments of petitioners and supporting *amici* that implied conflict preemption is an appropriate analytical theory for deciding this case, the analysis is not necessary. TTMA submits that the "reliable indicium" statement in *Cipollone* need not be defined here. Simply put, the *Cipollone* decision presents no impediment to finding that Federal motor vehicle safety standards preempt conflicting State common law standards. To the contrary, *Cipollone* fully supports a finding of *express* preemption based on the text of the Safety Act fairly construed.

The preemption clause of the Safety Act evidences Congress' intent that NHTSA safety standards have national, uniform effect. Section 1392(d) of the Act provides in part:

> (d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The plain meaning of this provision is that a State safety standard "not identical" to the Federal standard shall not be enforceable. Where a State standard conflicts with a Federal standard, it is not identical to that standard and, as commanded by the statute, cannot be enforced.[2]

The Safety Act also contains a "savings clause" that provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). This provision is entirely consistent with Section 1392(d) and does not foreclose express preemption analysis. To the extent that it even addresses Federal preemption, the savings clause simply affirms the intent of Congress that the safety standards promulgated by NHTSA not preempt *all* common law claims through implied field preemption.[3] This Court has

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[2] The prohibition in Section 1392(d) against establishing or enforcing any State "safety standard" that conflicts with a Federal safety standard fully encompasses State common law jury verdicts even though that provision does not expressly reference common law claims. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2619 (1992) ("requirement or prohibition" encompasses common law claims); *id.* at 2634 (Scalia, J., concurring); *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) ("standard relating to railroad safety" encompasses common law claims); *see also San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (State common law award of damages may constitute regulation in conflict with Federal regulation).

[3] Field preemption operates where Congress has enacted a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" and therefore the entire field of conduct is governed

previously examined other savings clauses and concluded that they simply indicated that Congress did not intend field preemption.

For example, in *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915), and *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court considered the preemptive scope of the Interstate Commerce Act and its savings clause, which provided that nothing in the Act "shall in anyway abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." 49 U.S.C. § 10103 (1976 ed., Supp. III). The Court held that this savings clause was included in the Act to make clear that Congress, having decided to authorize regulation in the field of interstate rail transportation, nonetheless did not intend to occupy that field exclusively and thereby deprive State courts of jurisdiction to decide common law claims which do not conflict with or undermine enforcement of the Federal regulations. *See Puritan Coal*, 237 U.S. at 129-30; *Kalo Brick*, 450 U.S. at 328. Otherwise, if the savings clause were interpreted to allow prosecution of inconsistent common law claims, then the statute would, in effect, "destroy itself." *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

Respondents argue that construing the savings clause merely to preclude implied field preemption renders it superfluous. *See* Respondents' Brief in Opposition to Petition, p. 16. The argument is, in essence, that preemption already operates under Section 1392(d) where the State standard is "applicable to the same aspect of performance" of the vehicle or equipment regulated, and therefore other State standards *not* applicable to that same aspect of performance are, by definition, not preempted and no savings clause is needed to preserve their

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exclusively by Federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

effect. Although this argument was accepted by the Court of Appeals in this case,[4] TTMA submits that it is not correct.

Under the Safety Act, a State standard can be applicable to the same aspect of performance as a Federal standard and still be preserved by the savings clause where the State standard does not conflict with the Federal standard or undermine its operation. For example, State common law claims alleging negligence by a manufacturer in implementing a Federal safety standard necessarily address the same aspect of performance as the Federal standard, but they are not preempted absent conflict with the Federal standard. State common law claims alleging defective design in implementing the Federal standard also address that same aspect of performance but are not preempted absent conflict. Similarly, common law claims based simply on an alleged failure to comply with a Federal safety standard—*per se* negligence claims—are not preempted absent conflict with the Federal standard, even though they, too, address the same aspect of performance as that

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[4] The Court of Appeals accepted this argument because a prior three-judge panel of that court had concluded that otherwise the savings clause would be rendered " 'a mere redundancy.' " *Myrick v. Freuhauf Corp.*, 13 F.2d 1516, 1520 (11th Cir. 1994) (quoting *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990)).

For the same reason, the Court of Appeals also refused to hold that the preemption clause in the Safety Act applied to State common law standards as well as State statutes and regulations. *Myrick*, 13 F.2d at 1527 n.5. In this refusal, the Court was clearly wrong, for as already noted the Safety Act prohibition against enforcement of a conflicting State "safety standard," 15 U.S.C. § 1392(d), fully encompasses State common law. *See supra* note 1. Indeed, if the preemption clause of the Safety Act only preempts State statutes and regulations, then there is no need to preserve common law claims and it is the savings clause that is redundant.

These were the only two reasons given by the Court of Appeals for rejecting express preemption analysis. *See Taylor*, 875 F.2d at 824-25.

standard. These State law claims do not conflict with or undermine the Federal standard, but rather promote compliance with that standard. The savings clause is therefore not redundant.[5]

The extensive national regulation of motor vehicles that Congress envisioned under the Safety Act (and in fact subsequently developed by NHTSA) was certain to create the potential claim that Congress must have intended to preempt the entire field of vehicle safety regulation and thereby federalize State common law. To foreclose this argument, Congress included the savings clause, as it had in other statutes, to exclude any finding of implied field preemption. NHTSA regulations are at least as detailed and pervasive as the ICC regulations at issue in *Puritan Coal* and *Kalo Brick*, and the savings clause in the Safety Act, like the savings clause in those cases, serves to ensure that despite the breadth and complexity of Federal regulations, State common law continues to operate where it does not conflict with those regulations.

In *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), the Court considered equally extensive regulations promulgated under the Airline Deregulation Act of 1978. The Court again declined to interpret a savings clause to permit prosecution of State law claims, this time in the face of an express preemption provision that was broadly worded to encompass any State law "relating to" rates, routes, or services of air carriers. 49 U.S.C. App. § 1305(a)(1). Even given the breadth of that operative preemption language, the Court held that

[5] But even if it were, it would be more appropriate to conclude that Congress was redundant than to conclude that it was senseless. If the Court were to find that the Savings clause is not needed to ensure the continuation of State common laws that do not conflict with NHTSA safety standards, it would seem more likely that Congress nonetheless included the clause out of redundance than for the purpose of completely overriding the express preemption clause through conflicting State common law jury verdicts. *See Miranda v. Fridman*, 647 A.2d 167, 174 (N.J. Super. 1994).

its specificity prevailed over the general character of the savings clause.[6] *Morales*, 112 S. Ct. at 2037-40. The preemption clause of the Safety Act at issue in this case offers still greater specificity, expressly allowing State law to address other aspects of safety performance not covered by a Federal standard and further allowing State law to address the same aspect of performance so long as it does not conflict with the Federal standard. The "not identical" operative language of the Safety Act, 15 U.S.C. § 1392 (d), is certainly more specific than the preemption clause contained in the Airline Deregulation Act, and therefore this specific clause should likewise prevail over the general savings clause of the Safety Act.

This consistent reading of the preemption clause and savings clause of the Safety Act gives both provisions the logical meaning Congress intended, and it preserves national uniformity on those aspects of vehicle equipment and performance for which NHTSA has issued safety standards that require uniformity. This goal of national uniformity is of particular importance to TTMA members, who manufacture thousands of trailers each year that are designed for and in fact are utilized in interstate transportation. If safety standards are allowed to vary from state to state in conflict with the Federal safety standards, then the interstate use of these trailers becomes a practical impossibility. Integrated trailer components required by NHTSA or designed to comply with NHTSA safety standards cannot be altered in the midst of interstate transport. Brake assemblies and other types of safety equipment simply cannot be interchanged at State lines to comply with a multitude of varying liability standards imposed by common law juries having differing inclinations from NHTSA.

[6] The savings clause provided that "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. App. § 1506.

Recognizing express preemption also leaves the responsibility for defining appropriate safety standards with the agency Congress established for that purpose. The safety standards would continue to be established by neutral, experienced safety experts following notice and an opportunity for comment by all interested parties, including industry representatives, consumers, and State representatives who may wish to participate. *See* 15 U.S.C. §§ 1392(f), 1395(b) & 1396. This approach does not favor any of the interested parties, and it ensures nationwide uniformity.

II. STANDARD NO. 121 CONFLICTS WITH RESPONDENTS' STATE COMMON LAW CLAIMS.

The historical development of Standard No. 121 is summarized in detail in the reported decision in *Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). After reviewing the state of available braking technology, NHTSA originally issued a Standard requiring the use of antilock devices on all truck and trailer service brakes. *Id.* at 639 n.26. However, field testing demonstrated that this Standard demanded more than was in fact technologically feasible for large trucks and trailers. Antilock components proved unreliable, and the result was that "many vehicles equipped with antilocks were potentially more dangerous in performance than pre-Standard vehicles. . . ." *Id.* at 643. For this reason, the Ninth Circuit in *Paccar* suspended enforcement of the antilock requirement, and NHTSA subsequently amended the Standard to exempt trucks and trailers from compliance with those requirements. *See* 44 Fed. Reg. 46,849 (1979); *see also* 49 C.F.R. § 571.121.S3. As a consequence, truck and trailer manufacturers now have the judicially ordered and agency sanctioned choice under Federal law of installing air brake systems without antilock devices, or air brake systems with antilock devices

that satisfy the optional criteria which remain a part of Standard No. 121.

Having survived the procedural rule-making requirements for issuing Federal safety standards, *see* 15 U.S.C. § 1392(f); 5 U.S.C. § 551, *et seq.* and 5 U.S.C. § 701 *et seq.*, both choices—simple air brake systems, and air brake systems with antilock devices—have been determined by NHTSA to be reasonable and practicable. Both choices are regulated in detail under Standard No. 121. *See* 49 C.F.R. § 571.121. The only restriction is that, until more convincing evidence of the reliability and safety of antilock devices for large trucks and trailers is collected, NHTSA cannot under *Paccar* again *require* installation of such devices on these vehicles. *See* 573 F.2d at 643. In the meantime, the option of installing air brakes without antilock devices remains an acceptable, safe alternative that fully satisfies the requirements of safety and practicability imposed by NHTSA.[7]

This finding by NHTSA following the *Paccar* decision that the use of air brakes without antilock devices is a reasonable, practicable and appropriate safety standard is the source of conflict with the Respondents' claims that

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[7] Standard No. 121 is not a minimum performance standard. Despite the finding in *Paccar*, Respondents may argue that air brakes fitted with antilock devices are safer than air brake systems lacking such devices, and therefore a State common law jury verdict requiring the use of such devices comprises a higher performance standard that does not conflict with Standard No. 121. However, the *Paccar* history proves otherwise. NHTSA simply failed to establish that antilock devices are safer. Therefore, even though portions of the antilock provisions in Standard No. 121 are drafted in terms of performance requirements, those provisions in effect required the use of a specific type of equipment. If made compulsory by a State common law jury verdict, they would deprive the manufacturer of its present judicially-mandated option under Standard No. 121 to use other equipment NHTSA has deemed acceptable.

under State common law the Petitioners' failure to install antilock devices was unreasonable and unsafe. The Respondents' common law claims rest on the allegation that it was unreasonable for the manufacturers not to install antilock brakes. In other words, the Respondents must prove and the jury must find, as a matter of State law, that the use of air brakes without antilock devices was unreasonable. By contrast, Standard No. 121 reflects a finding, as a matter of Federal law, that the use of non-antilock brakes is a reasonable alternative.

The conflict between Federal and State law thus involves Respondents' request both that a jury change the rule from optional equipment to mandatory equipment, and that the jury reject as unreasonably dangerous air brake technology which Standard No. 121 defines as reasonably safe. The jury verdict requested by Respondents, if allowed, would delete from the Federal regulations an alternative preserved as a result of the *Paccar* decision and, in the face of the demonstrated potential for increased danger if antilock devices are required, would impose liability on manufactureres who, in full compliance with the Federal safety standard, elect not to utilize these devices.

This Court has held that State law is preempted if it interferes with the methods by which a Federal statute was designed to reach its goal. *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Allowing State common law jury verdicts to delete alternatives permitted under Federal law interferes with the methods NHTSA has established for achieving motor vehicle safety in this case. It further allows States to do indirectly what the Court in *Paccar* held NHTSA could not do directly—*require* the use of antilock devices on all trucks and trailers. *See id.* at 495.

III. RECOGNITION OF EXPRESS PREEMPTION WILL ENSURE NATIONAL UNIFORMITY FOR FEDERAL MOTOR VEHICLE SAFETY STANDARDS, AND WILL PROMOTE NHTSA EFFORTS TO DEVELOP AND ENFORCE THESE STANDARDS.

Even a cursory review of some of the Federal safety standards regulating truck trailer design, manufacture and performance reveals the variety of types of standards that NHTSA has promulgated. *See* 49 C.F.R. § 571.1 *et seq.* Some standards require the use of specific safety equipment or allow the manufacturer to choose among specified equipment options. Others do not specify equipment, but instead define performance criteria and leave the choice of technology to manufacturers. Still others define the standard in terms of required performance, while practical considerations and available technology mandate the use of specific equipment. State common law may impose equally varied safety standards, and each case must be evaluated separately to determine the precise nature of each claim asserted and whether the State standard of liability conflicts with any applicable Federal safety standard. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

As trailer manufacturers and suppliers of trailer component parts, TTMA members encounter numerous common law claims that allege violations of State safety standards. Many of these cases involve Federal standards not unlike Standard No. 121, in that they reflect NHTSA's evaluation of proposed alternative technologies and conflicting safety concerns and then establish a range of acceptable compliance options.

For example, NHTSA specifies minimum and maximum candlepower values for motor vehicle lighting equipment. *See* 49 C.F.R. § 571.108. The reason is obvious. Lights that are too bright can distract or impair the vision of other drivers and cause accidents. Lights that are not bright enough create different safety risks by not notify-

ing other drivers of the presence of another vehicle. Having complied with the lighting requirements by installing lights having candlepower values within the range allowed under the Federal standard, a manufacturer should not be subjected to common law liability for failing to *exceed* the standards in a case where the plaintiff claims the defendant's vehicle could not be seen, nor should the manufacturer be forced to defend against a claim that it should have used *less* candlepower in a different case where the plaintiff claims that the defendant's vehicle was equipped with lights that were too bright and impaired his vision.[8]

Another area of recurrent litigation for truck trailer manufacturers involves the performance of rear bumpers. On the one hand, plaintiffs have claimed that the bumpers are too rigid and cause excessive injuries due to both the deceleration forces sustained by the occupants of a vehicle that collides with the rear end of a trailer and the crush of the front end of the colliding vehicle itself. On the other hand, plaintiffs frequently claim that the bumpers are too flexible and permit a colliding vehicle to underride the trailer, causing the trailer to intrude into the vehicle's passenger compartment. NHTSA is presently reviewing available technology and test data for purposes of promulgating a safety standard regulating rear bumpers specifically for trucks and trailers, and it must attempt

[8] The use of reflectors and reflective tape presents a similar dilemma. *See* 49 C.F.R. 571.108; *see also* 49 C.F.R. § 393 Subpart B. Trailer manufacturers may be sued both by plaintiffs who claim that trailers were not sufficiently conspicuous and more reflective devises should have been used than is required under the Federal safety standard, as well as by other plaintiffs who claim that excessive reflective devises were used and created a distracting "billboard effect." The NHTSA safety standard in these cases is more akin to a true minimum standard, requiring certain reflectors but permitting States to require more unless doing so "impairs the effectiveness" of the Federally required reflectors. 49 C.F.R. § 571.108.S5.1.3. Depending on the circumstances of particular claims, State common law may not conflict with the Federal standard.

to harmonize the safety concerns that exist on both sides of this issue. *See* 57 Fed. Reg. 12,289 (Apr. 9, 1992); 57 Fed. Reg. 252 (Jan. 3, 1992).

A manufacturer's compliance with a Federal safety standard that establishes a range of acceptable performance or equipment options for circumstances such as these should, through express preemption analysis under the Safety Act, preclude imposition of State common law liability on grounds that the manufacturer should have exceeded the maximum or gone below the minimum set by Federal law or should have used some other type of equipment not included in the list of acceptable options. The manufacturer fully complied with the Federal standard by installing equipment that performs in a manner expressly deemed safe by the agency Congress created to investigate risks, evaluate technology and define reasonably safe, practicable and appropriate standards. Congress deemed the expertise of this agency sufficiently paramount to expressly preempt contrary findings by State common law juries. Each range of allowable performance or list of optional safety equipment is established by NHTSA after extensive study and testing.

Permitting manufacturers to rely on compliance with NHTSA standards is only fair in light of the fact that they can be held liable under State common law on a theory of *per se* negligence if they *fail* to comply with a Federal standard. NHTSA can also impose civil penalties if they do not comply with the Federal standard. *See* 15 U.S.C. § 1398. Surely Congress did not intend to require manufacturers to comply with Federal standards on penalty of Federal regulatory sanctions and State common law liability, while at the same time permitting plaintiffs to allege that some *other* conflicting safety standard should have been followed as a matter of State common law.

This argument applies with equal force where the Federal safety standard is defined in terms of a range

of acceptable performance or list of acceptable equipment options. If NHTSA should modify a specific performance range or delete equipment options, it must do so for the same reasons a State common law jury would reject a manufacturer's choice of approved technology. Under the Safety Act, this is NHTSA's responsibility and not the responsibility of State common law juries who, because of differing factual circumstances from case to case, will impose different standards from state to state. In deciding this case, the Court should not arrogate to common law juries the authority Congress assigned to NHTSA under the Safety Act.

CONCLUSION

For these reasons, TTMA respectfully submits that the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

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November 16, 1994

No. 94-286 (9)

Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-286

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AND NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

American Trucking Associations, Inc. (ATA) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect

the interests of the trucking industry. That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of for-hire carriers, private carriers, leasing companies, and trucking suppliers. ATA regularly advocates the trucking industry's interests before this Court and other courts. This Court previously granted ATA's motion for leave to file a brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.

National Association of Manufacturers (NAM), a nonprofit trade association, is the largest national trade association for the country's manufacturing sector. Its members, approximately 12,800 companies and subsidiaries, cover the full spectrum of manufacturing industries and range in size from large companies to numerous small businesses. NAM's members employ approximately 85% of all manufacturing workers and produce over 80% of the manufactured goods in the United States. NAM members operate in every state of the country and are vitally interested in protecting the free flow of commerce unburdened by improper state legal impediments.

Members of ATA and NAM have a strong interest in motor vehicle safety. The Federal Motor Vehicle Safety Standard at issue in this case, 49 C.F.R. § 571.121 (FMVSS 121), grants an option to motor vehicle manufacturers whether to install antilock braking devices on trucks and trailers. The court of appeals nevertheless held that FMVSS 121 does not preempt inconsistent state common law standards that *require* antilock brakes for trucks and that lay juries are at liberty to second-guess the policy judgment of an expert federal agency on the complex issue whether a particular motor vehicle must have antilock brakes. In so ruling, the court adopted an unprecedented and plainly erroneous interpretation of this Court's holding on federal preemption in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

If this rationale stands, it will have a profound and deleterious effect not only on Federal Motor Vehicle Safety Standards but in all cases in which a federal preemption defense is properly advanced by those (such as the members of ATA and NAM) who must comply with uniform federal health or safety standards. ATA and NAM accordingly have a vital interest in the issues presented in this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents' tort actions under Georgia law seek damages from petitioners based solely on the fact that trucks manufactured by petitioners, which were involved in accidents affecting respondents, did not have antilock brakes. Petitioners have raised a federal law preemption defense, citing their compliance with the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169) (Safety Act),[2] and FMVSS 121, 49 C.F.R. § 571.121, promulgated by the National Highway Traffic Safety Administration (NHTSA) under the Safety Act.

FMVSS 121, when originally promulgated in the early 1970s, required antilock brakes on all trucks and trailers. See *Paccar, Inc.* v. *National Highway Traffic Safety Admin.*, 573 F.2d 632, 639 n.26 (9th Cir.), cert. denied, 439 U.S. 862 (1978). The Ninth Circuit in *Paccar* invalidated this requirement, focusing on the "massive evidence presented to NHTSA that many vehicles equipped with antilock[] [brakes] were potentially more dangerous in performance than pre-Standard [121] vehicles" and finding that "the agency's failure to conduct more intensive testing of trucks and tractor-trailers certified under the Standard" was an "abuse of its

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.

[2] For ease of reference, we cite to the prior codification, which was cited by the courts below.

discretion." *Id.* at 643. The court concluded that, in these circumstances, a standard mandating antilock brakes "created a potentially * * * hazardous highway situation." *Ibid.*

The Ninth Circuit remanded the case to NHTSA and invited the agency to "propose new standards" supported by "more pro[b]ative and convincing data evidencing the reliability and safety of vehicles that are equipped with antilock" brakes. *Ibid.* Unable to do so at that time, NHTSA instead amended FMVSS 121 to make antilock brakes optional on trucks and trailers. See 44 Fed. Reg. 46,849 (1979). FMVSS 121, which has not since been amended by NHTSA to remove this option, now provides "standards for minimum acceptable performance" of optionally installed antilock brakes, *ibid.*, and states explicitly that any regulations that would appear to require the installation of antilock brakes "are not applicable to trucks and trailers." FMVSS 121 § S3.

In their defense, petitioners in this case invoked the express option granted under FMVSS 121 not to install antilock brakes on their trucks and the preemption provision of the Safety Act, which proscribes any state safety standard that is inconsistent with an FMVSS. 15 U.S.C. § 1392(d). Although the Eleventh Circuit acknowledged that FMVSS 121 "gave manufacturers the choice of whether to install anti-lock brakes" (Pet. App. 6a), the court nevertheless rejected petitioners' preemption defense.

The court of appeals erroneously held that the Safety Act does not expressly preempt respondents' tort claims because the Act's preemption provision does not refer to state common law and the Act's general savings clause bars preemption of common law liability. This Court has previously rejected both of these rationales. In *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2619-2621 (1992), the Court held that a preemption clause referring only to state law "'requirement[s] or prohibition[s]'" encompassed common

law liability. And the Court has long held that a general savings clause is properly read only as indicating Congress' intent to preclude field preemption and should not otherwise be construed to undermine a carefully drawn federal regulatory regime.

The Eleventh Circuit also rejected petitioners' implied preemption argument. Without a hint of the drastic consequences, the court of appeals revolutionized federal preemption law by interpreting this Court's decision in *Cipollone* to mandate "that when there is an express pre-emption provision" in a federal statute a court "should not consider implied pre-emption" at all. Pet. App. 11a. Under this expansive reading of *Cipollone*, conduct that is *required* by federal law may be *prohibited* by state law. No decision of this Court has ever adopted or even remotely suggested this astounding result in the face of the Supremacy Clause of the Constitution. U.S. Const. art. VI.

These holdings on express and implied preemption, if affirmed by this Court, would dramatically undercut the efficacy of a variety of federal programs requiring nationally uniform standards and would have a severe adverse effect on interstate commerce. State tort law should not be allowed to frustrate the purposes of a federal scheme of health or safety regulation.

ARGUMENT

I. THE SAFETY ACT EXPRESSLY PREEMPTS COMMON LAW TORT CLAIMS THAT ARE INCONSISTENT WITH FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Respondents' tort claims under Georgia law are expressly preempted by the Safety Act, which mandates national uniformity in Federal Motor Vehicle Safety Standards (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

In explaining the need to preempt state law, the Senate Report on the Safety Act emphasized that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2714. Thus, "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." *Id.* at 4, 12, 1966 U.S.C.C.A.N. at 2712, 2720. As President Johnson remarked, the "alternative is unthinkable — 50 standards for 50 different states. I believe that this would be chaotic." 112 Cong. Rec. 14,253 (1966).

Respondents' tort claims are expressly preempted by the Act's prohibition on any state "safety standard applicable to the same aspect of [vehicle or equipment] performance" as an FMVSS that is not identical to that Standard. 15 U.S.C. § 1392(d). Here, respondents advocate a state common law standard that would *require* manufacturers to install antilock brakes on trucks by imposing potentially massive liability on any manufacturer that failed to do so. This common law rule unquestionably addresses an "aspect of [vehicle or equipment] performance."

FMVSS 121, however, governs "the same aspect of performance" as the common law rule urged by respondents. The Standard, as originally promulgated by NHTSA, mandated antilock brakes by requiring trucks to stop within certain distances without lockup of any wheel. *Paccar*, 573 F.2d at 639 n.26. In response to the Ninth Circuit's invalidation of this mandate on safety grounds in *Paccar*, NHTSA amended the Standard for the express purpose of removing the antilock brake requirement. See FMVSS 121 § S3, 49 C.F.R. § 571.121 S3 (regulations requiring antilock brakes "are not applicable to trucks and trailers"); 44 Fed. Reg. 46,849 (1979). NHTSA could simply have repealed (or suspended) the mandate. Instead, the agency chose to retain the performance requirements for antilock brakes in the event a manufacturer decided to install them, see *ibid.* (FMVSS 121 provides the "standards for minimum acceptable performance" of antilock braking systems), but made their installation optional. Thus, as the Eleventh Circuit acknowledged in this case, FMVSS 121 — by positive enactment of NHTSA and for purposes of highway safety — gives truck "manufacturers the choice of whether to install anti-lock brakes." Pet. App. 6a.[3]

The predicate for express preemption under Section 1392(d) of the Safety Act is therefore established. FMVSS 121 explicitly addresses the same "aspect of [vehicle or equipment] performance" — whether trucks must have antilock brakes — as the state law standard advocated by respondents. And the federal and state standards are not identical: the federal standard makes antilock brakes

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[3] The Eleventh Circuit recognized that respondents' tort claims are "addressed by a [federal] safety standard established under the Safety Act." Pet. App. 10a. Accordingly, this is not a case in which a Federal Motor Vehicle Safety Standard may be broadly construed to grant an "option" merely by failing to address an aspect of motor vehicle performance.

optional, whereas the state standard makes them *mandatory*. The court of appeals did not dispute that if the State of Georgia attempted to adopt this requirement (and thereby remove the federal safety option) by statute or regulation, then the state law would be expressly preempted. The only issue is whether the result should be different in this case because the State seeks to impose the same requirement through its common law. Respondents maintain, and the Eleventh Circuit held, that common law rules are not state "safety standards" and are not preempted by Section 1392(d).

A. The Safety Act's Preemption Clause Bars Inconsistent Common Law Duties.

In rejecting express preemption (Pet. App. 7a-11a), the Eleventh Circuit held that common law claims do not fall within the express preemption provision of the Safety Act because Congress failed to "'make explicit reference to state common law in the Act's pre-emption clause.'" Pet. App. 8a (quoting *Taylor* v. *General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990)).

That rationale, however, was clearly repudiated by *Cipollone*, which held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] . . . imposed under State law.'" See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J., concurring in part and dissenting in part). The *Cipollone* Court held that it made no difference that the preemption provision failed to "make explicit reference" to common law claims. This holding was premised on the Court's long-held view that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" *Id.* at 2620 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)).

Numerous decisions by this Court have emphasized that the Supremacy Clause does not recognize a distinction

between state regulation in the form of statutes and rules on the one hand, and common law duties enforced by judges and juries on the other. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (a "system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformity contemplated by Congress"); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982); see also *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

Since the decision in *Cipollone*, the widely accepted understanding among the courts of appeals is that statutory language preempting state law "requirements" or "standards" necessarily means that Congress intended expressly to preempt common law claims.[4] Indeed, the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of preemption clauses in numerous federal health and safety statutes, including the Federal Insecticide, Fungicide and

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[4] See *National Bank of Commerce of El Dorado* v. *Kimberly-Clark Corp.*, No. 93-3012, 1994 U.S. App. LEXIS 24,616 (8th Cir. Oct. 25, 1994); *Gile* v. *Optical Radiation Corp.*, 22 F.3d 540, 542 (3d Cir.), cert. denied, 63 U.S.L.W. 3343 (U.S. Oct. 31, 1994); *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748-749 (4th Cir. 1993); *King* v. *E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 114 S. Ct. 490 (1993); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 114 S. Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), cert. denied, 114 S. Ct. 60 (1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993).

Rodenticide Act, 7 U.S.C. §§ 136, *et seq.*,[5] the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261, *et seq.*,[6] the Medical Device Amendments of 1976 to the Federal Food,

[5] See, *e.g.*, *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham* v. *Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen* v. *Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co.* v. *MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597, 601 (D. Idaho 1994); *Quad R Farms* v. *American Cyanamid Co.*, 840 F. Supp. 694 (D. Minn. 1993); *DerGazarian* v. *Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich* v. *Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque* v. *Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper* v. *E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson* v. *Dow Chem. Co.*, No. Civ. A. 92-30, 1992 WL 404681, *2 (E.D. Ky. Oct. 19, 1992); *Brennan* v. *Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *Yowell* v. *Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *June* v. *Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993), aff'd, No. 70011, 1994 WL 601588 (N.Y. App. Div. Nov. 3, 1994); *Hopkins* v. *Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-146 (N.C. Ct. App. 1993).

[6] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 113 S. Ct. 2999 (1993); *DeHaan* v. *Whink Prods. Co.*, No. 91 C 0014, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar* v. *Whink Prods. Co.*, No. 93CA0055, 1994 WL 115876, *2 (Colo. Ct. App. Apr. 7, 1994), cert. denied (Oct. 17, 1994); *State ex rel. Jones Chems., Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994).

Drug and Cosmetic Act, 21 U.S.C. §§ 360c, *et seq.*,[7] and the Federal Boat Safety Act, 46 U.S.C. §§ 4301, *et seq.*[8]

The Eleventh Circuit's contrary holding in this case — that the reference in the Safety Act's preemption clause to any inconsistent state "safety standard" does *not* encompass common law standards — cannot stand in light of this Court's decision in *Cipollone*, which has been followed by scores of federal and state court decisions finding express preemption in similar contexts.

[7] See, *e.g.*, *Mendes* v. *Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King v. Collagen Corp.*, 983 F.2d 1130, 1135 (1st Cir.), cert. denied, 114 S. Ct. 84 (1993); *Slater* v. *Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), cert. denied, 113 S. Ct. 327 (1992); *Bravman* v. *Baxter Healthcare Corp.*, 842 F. Supp. 747, 755 (S.D.N.Y. 1994); *Griffin* v. *Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker* v. *Collagen Corp.*, No. 93 C 2375, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994); *Michael* v. *Shiley, Inc.*, No. Civ. A. 93-1729, 1994 WL 59349, *6 (E.D. Pa. Feb. 25, 1994); *Kemp* v. *Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter* v. *Zimmer, Inc.*, 830 F. Supp. 199, 203 (S.D.N.Y. 1993); *Cameron* v. *Howmedica, Div. of Pfizer Hosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker* v. *Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992), aff'd, 5 F.3d 1489 (3d Cir. 1993); *Covey* v. *Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D. Ohio 1993).

[8] See, *e.g.*, *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993).

B. The Safety Act's Savings Clause Does Not Preserve Common Law Duties That Are Inconsistent With An FMVSS.

In finding no express preemption, the Eleventh Circuit also held (Pet. App. 7a-8a) that the Safety Act's savings clause, 15 U.S.C. § 1397(k) (compliance with a FMVSS "does not exempt any person from any liability under common law"), bars express preemption of common law liability.[9] The savings clause, however, serves a far more limited function than the one ascribed to it by the Eleventh Circuit. The court of appeals failed to address this function — or the many decisions of this Court supporting a narrow interpretation of the savings clause. See *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) ("general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision").

The savings clause in the Safety Act indicates Congress' intent not to occupy the entire field of motor vehicle safety, so that common law claims could proceed in areas *not* covered by a safety standard. Faced with similar provisions in other statutes, this Court has interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose liability for acts permitted by a federal agency, the Court explained that general savings clauses do not allow

[9] The court of appeals noted that the statute in *Cipollone*, unlike the Safety Act, lacked a savings clause. That cannot be dispositive, however, because this Court found express preemption of common law claims in *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1736-1737 (1993), and the statute at issue had a savings clause. See pages 20-21, *infra*; see also *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-2040 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

states to enforce state law claims that conflict with federal law. 450 U.S. at 328. Rather, general savings clauses are included in statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." See also *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976); see generally pages 24-25, *infra*.

So too, the savings clause in the Safety Act was added not to defeat the statutory goal of creating a set of nationally uniform motor vehicle safety standards, but rather to indicate Congress' intent not to preempt the remainder of the field of motor vehicle safety not covered by those standards.

Thus, the savings clause expressly preserves common law actions that do not relate to the "same aspect of performance" as a Federal Motor Vehicle Safety Standard. 15 U.S.C. § 1392(d). This case is an excellent example: FMVSS 121 expressly grants, for safety reasons (see pages 3-4, 7, *supra*), a choice whether to install antilock braking devices and provides specifications for those devices that are installed. The savings clause would thereby preserve a common law claim that an antilock braking system was negligently

manufactured. See *Sours* v. *General Motors Corp.*, 717 F.2d 1511, 1516-1517 (6th Cir. 1983) (tort claim allowed because no conflict between defective design claim and FMVSS 216). On the other hand, it would not preserve a common law action, such as the claims under review here, seeking to recover damages from a defendant merely for exercising a federally granted safety option. Such a lawsuit is inconsistent with FMVSS 121 because it extinguishes a choice granted, as a matter of safety, by NHTSA. See, *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install-airbag claim from a claim that a particular airbag system was not properly designed, and holding that the latter claim is not preempted).

The savings clause in Section 1397(k), which is wholly separate from the Safety Act's preemption provision in Section 1392(d), gives no indication on its face that it was intended to create a giant exception to the Act's preemption section. In fact, Section 1392(d) expressly provides two exceptions to the general rule of federal preemption for any state safety standard that "is identical to a Federal safety standard" and for safety standards imposing higher standards of performance for government vehicles.[10] These two narrow provisions in Section 1392(d) show that when Congress intended to create exceptions to federal preemption,

[10] The exceptions in Section 1392(d) provide that:

> [n]othing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

it included them in the preemption section of the Act, and that Congress otherwise intended federal safety standards to preempt all state laws that conflict with those standards.

The Eleventh Circuit in this case failed to follow this statutory scheme, as well as this Court's precedents, in construing the Safety Act's savings clause to authorize state law tort claims that serve to undermine a carefully drawn system of nationally uniform federal safety standards.

II. THE SAFETY ACT IMPLIEDLY PREEMPTS COMMON LAW TORT CLAIMS THAT ARE INCONSISTENT WITH FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Even if respondents' claims are not expressly preempted by the Safety Act, they are impliedly preempted because they conflict with an FMVSS. Under the Safety Act's scheme of nationally uniform motor vehicle safety standards, every court of appeals that had addressed the issue (including the Eleventh Circuit until its decision in this case) had concluded that tort claims based on a motor vehicle manufacturer's exercise of an FMVSS safety option were impliedly preempted under the Safety Act because state tort law would conflict with and frustrate the purposes of the federal regulatory scheme.[11] Relying on numerous preemption

[11] The prior cases involved common law claims based on a motor vehicle manufacturer's failure to install airbags, which were found to be impliedly preempted under the Safety Act and FMVSS 208, 49 C.F.R. § 571.208 (granting manufacturers an option to install airbags). See *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1989); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). A number of state appellate courts reached the same result. See, *e.g.*, *Nissan Motor Corp.* v. *Superior Court*,

decisions of this Court, the Eleventh Circuit in *Taylor* v. *General Motors Corp.*, 875 F.2d 816, 827 (1989), cert. denied, 494 U.S. 1065 (1990) (applying FMVSS 208), had concluded that "a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option."

Those decisions properly followed a line of precedents holding that any state law that removes or restricts an option granted by a federal regulation conflicts with federal law and is preempted. In *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. at 155, for example, the Court held that a federal regulation granting federal savings and loan associations the option of including "due-on-sale clauses in their contracts" preempted California common law, which provided that due-on-sale clauses were unenforceable. California common law was preempted because it purported to give "the California courts * * * [authority to] forbid[] a federal savings and loan to enforce a due-on-sale clause solely 'at its option' and * * * deprived the lender of the 'flexibility' given it by the" federal regulation. *Ibid.* See also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 708-709 (1984) (state law cannot deprive regulated entities of "flexibility and discretion" deliberately conferred by federal law); *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 260-261, 270 (1985) (state law is preempted to the extent it eliminates "flexibility" contemplated by federal law).

The same result should have obtained in this case. The Eleventh Circuit, however, refused to follow this Court's decisions and even its own precedent (as well as the unbroken

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261 Cal. Rptr. 80 (Cal. Ct. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Gardner* v. *Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), app. dismissed, 543 N.Y.S.2d 401 (1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 487 U.S. 1236 (1988).

chain of rulings from other circuits) finding implied preemption under the Safety Act. Instead, the court of appeals charted a new course in federal preemption law by holding that it was powerless to engage in any implied preemption analysis. This remarkable conclusion was based upon a plain misreading of this Court's decision in *Cipollone*.

A. *Cipollone* Did Not Radically Transform Preemption Law.

The Eleventh Circuit held that it was obliged to reject petitioners' implied preemption defense in light of a single sentence in *Cipollone* stating that if a federal statute has an express preemption clause and if "that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." 112 S. Ct. at 2618 (citations omitted). The court of appeals broadly interpreted this one sentence to mean that the implied preemption doctrine is no longer applicable to statutes with express preemption clauses. Because the Safety Act has a preemption clause, 15 U.S.C. § 1392(d), the court refused to consider an implied preemption analysis (Pet. App. 11a).[12]

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[12] The Eleventh Circuit tried to minimize the significance of its holding by asserting that "eight of our sister circuits have reached the same conclusion." Pet. App. 11a. None of the cases cited by the court, however, held that an express preemption clause precludes implied preemption where — as here — there is an actual conflict between federal and state law. In most of the cases cited, the courts found express preemption, see *Worm* v. *American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Kinley Corp.* v. *Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993); *Weber* v. *Heaney*, 995 F.2d 872 (8th Cir. 1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993); *Greenwood Trust Co.* v. *Commonwealth of Massachusetts*, 971 F.2d 818 (1st Cir. 1992), cert. denied, 113 S. Ct. 974 (1993), and thus there was

1. This rationale is flatly inconsistent with this Court's precedents. As a threshold matter, it is at odds with the long-settled proposition that any state law that conflicts with federal law is preempted "by direct operation of the Supremacy Clause," without regard to whether the federal statute or regulation contains a preemption clause. *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). Indeed, the *Cipollone* Court itself noted that since the "decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that state law that conflicts with federal law is 'without effect.'" 112 S. Ct. at 2617.

Whether a federal statute preempts state law is determined by the intent of Congress, which may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. at 1737. Even "[i]n the absence of an express congressional command," however, a "state law is pre-empted if that law actually conflicts with

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no need to decide whether implied preemption bars application of a state law that is beyond the scope of an express preemption clause but that conflicts directly with federal law. In three other cases, there was no conflict between state and federal law, *Draper* v. *Chiapuzio*, 9 F.3d 1391 (9th Cir. 1993); *Toy Mfrs. of Am., Inc.* v. *Blumenthal*, 986 F.2d 615 (2d Cir. 1993); *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir.), cert. denied, 114 S. Ct. 291 (1993), and in one case the Second Circuit stated that "a finding of implied preemption * * * is not *automatically* foreclosed by the existence of a preemption clause." *Toy Mfrs. of Am.*, 986 F.2d at 623 (emphasis in original).

federal law." *Cipollone*, 112 S. Ct. at 2617. As Justice Souter observed last Term, "whether or not Congress has used any special 'preemptive' language, state regulation must yield to the extent it actually conflicts with federal law." *BFP* v. *Resolution Trust Corp.*, 114 S. Ct. 1757, 1776 (1994) (Souter, J., dissenting, joined by Blackmun, Stevens, and Ginsburg, JJ.).

Thus, although a statutory preemption clause "must in the first instance" be the focus of any preemption analysis, *Easterwood*, 113 S. Ct. at 1737, such a clause does not preclude implied conflict preemption.[13] This Court has often considered (indeed, accepted) implied preemption arguments in cases involving federal statutes with express preemption clauses. See, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142-143 (1990); *Northwest Cent. Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509-522 (1989). In *Jones* v. *Rath Packing Co.*, for example, the Court concluded that, although the express preemption provision of the Fair Packaging and Labeling Act, 15 U.S.C. § 1461, did not preempt the state law at issue, the Supremacy Clause prohibited enforcement of that law because it conflicted with the federal statute and prevented "the accomplishment and execution of the full purpose and objectives of Congress." 430 U.S. at 526, 540-543 (internal quotation marks omitted). The Court held that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict." *Id.* at 525-526.

2. The Eleventh Circuit nonetheless held, and respondents maintain, that in one sentence the *Cipollone* Court intended to repudiate this long line of precedents

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[13] No presumption against preemption is applicable in deciding whether state law conflicts with federal law. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988).

interpreting the Supremacy Clause over the last two hundred years. This reading of *Cipollone* is singularly improbable in light of both the complete absence of any suggestion that the Court was embarking on such a radical course, see, *e.g.*, *Lee* v. *Weisman*, 112 S. Ct. 2649, 2655 (1992), and the contrary decisions rendered by this Court immediately before and after *Cipollone*.

In *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2382 (1992), for example, the plurality found that a state law was impliedly preempted despite an express preemption clause in the federal statute. Justice Kennedy concluded that the state law was expressly preempted and concurred only in the judgment. *Id.* at 2388. No Member of the Court stated or even hinted that the doctrine of implied conflict preemption was inapplicable because of the presence of an express preemption clause. The court of appeals nonetheless dismissed *Gade* as a mere "plurality opinion" (Pet. App. 14a). The significance of *Gade*, however, is that the opinion was joined by three Justices (the Chief Justice and Justices O'Connor and White) who would — six days later — join the sentence in *Cipollone* that the court below interpreted to bar implied preemption in the face of an express preemption clause.

Indeed, after *Cipollone*, this Court decided *CSX Transp., Inc.* v. *Easterwood*, which considered whether state tort claims regarding a warning device at a railroad crossing were preempted by the Federal Railroad Safety Act (FRSA). The FRSA has an express preemption clause that bars any state law requirement that relates to railroad safety when there is a federal "rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. Because the Court concluded that the federal regulations at issue did not "cover" the same subject matter as the tort claims, it held that those claims were not expressly preempted. 113 S. Ct. at 1742. The Court proceeded to "reject" the

"claim of implied 'conflict' preemption on the basis of the preceding analysis" (*id.* at 1742 n.12 (citation omitted)).

The Eleventh Circuit interpreted *Easterwood* as precluding a "separate implied pre-emption analysis" if there is an express preemption clause in a statute (Pet. App. 17a). However, as Judge Hill noted in his dissent below, the more logical reading is that the Court "did not conduct an implied conflict pre-emption analysis because, 'on the basis of the preceding analysis,' it found no conflict between the federal regulations and the common law negligence claim" (*id.* at 30a). Thus, the Court considered and "reject[ed]" implied preemption *on the merits*, not because it was inappropriate to consider the contention.

In fact, the *Easterwood* Court stated that an express preemption clause is *not* dispositive. Preemption analysis "must *in the first instance* focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 113 S. Ct. at 1737 (emphasis added). In this case, by contrast, the court of appeals held that an express preemption clause is not the first but the *only* evidence ("the alpha and omega" (Pet. App. 18a)) of Congress' preemptive intent. That holding is wrong both as a general proposition and as applied to the Safety Act.[14]

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[14] A number of courts have considered the issue of implied preemption under the Safety Act since *Cipollone* was decided and have, unlike the Eleventh Circuit, found common law tort claims impliedly preempted. See, *e.g.*, *Boyle* v. *Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs* v. *Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Gills* v. *Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993). Moreover, the D.C. Circuit recently stated in *Jackson* v. *Culinary School of Washington, Ltd.*, 27 F.3d 573, 581 n.12 (1994), that it does

> not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses

B. The Preemption Clause In The Safety Act Does Not Provide A Reliable Indicium Of Congressional Intent.

A careful reading of *Cipollone* and *Easterwood* reveals that implied conflict preemption has *not* been abolished in *all* cases involving federal statutes with express preemption clauses. Instead, *Cipollone* stands only for the unremarkable proposition that, because congressional intent is the "'ultimate touchstone'" of preemption analysis, *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978) (citation omitted), implied preemption arguments might be barred where a statute's express preemption clause "provides a 'reliable indicium of congressional intent with respect to state authority.'" 112 S. Ct. at 2617, 2618 (quoting *Malone*, 435 U.S. at 505). The sentence in *Cipollone* seized on by the Eleventh Circuit as radically reworking federal preemption law is, in fact, nothing more than a recapitulation of this Court's prior decisions on preemption and the Supremacy Clause, relying as it does on *Malone* and a plurality opinion by Justice Marshall in *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 282 (1987), neither of which provides any support for the Eleventh Circuit's remarkable holding.

Instead of following this Court's settled precedents, the Eleventh Circuit cavalierly brushed aside the "reliable indicium" requirement of *Cipollone* and *Malone*, finding it "not much of a hurdle" (Pet. App. 18a). Although the court recognized that this requirement was a "condition" of this Court's analysis in *Cipollone* (*ibid.*), it converted this

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altogether the possibility that state statutes in actual conflict can be preempted. * * * Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a "reliable indicium of congressional intent with respect to state authority." *Cipollone*, 112 S. Ct. at 2618.

condition into a "presumption" (*id.* at 19a) — with no precedent or rationale to support it — that a preemption clause, in and of itself, is always a reliable indicium of congressional intent to eliminate implied preemption. This presumption, in the court of appeals' view, is virtually conclusive: a preemption clause is "the alpha and omega" of the inquiry on congressional intent (*id.* at 18a).[15]

If it had examined the issue of congressional intent as required by *Cipollone* and *Malone*, however, the court of appeals would have found — for at least three reasons that it rejected without serious analysis — that the Safety Act's preemption clause does not provide a reliable indication of congressional intent to preclude implied preemption of state laws that conflict with the federal scheme embodied in the Act.

1. Most important, the Safety Act's preemption provision, 15 U.S.C. § 1392(d), does not purport to be an exhaustive description of the state authority that Congress meant to displace. Nothing on the face of Section 1392(d) suggests that it was intended to wipe out implied preemption and to authorize states to engage in lawmaking that would conflict with or frustrate the purposes of the federal scheme.

Moreover, it is significant that this case involves preemption by federal regulation. Where the source of preemptive federal action is an administrative agency rather than Congress itself, it is unreasonable to expect a statutory preemption provision to define the full scope of preemption required to ensure the supremacy of federal law. This is

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[15] If anything, the presumption should operate in the opposite direction. Absent compelling evidence to the contrary, it should be presumed that Congress did *not* intend to eliminate the implied preemption doctrine. After all, why would Congress want to authorize state action that conflicts with or frustrates the purposes of federal law?

especially true here because the safety regulations were issued under a broad delegation of congressional power. See 15 U.S.C. §§ 1381, 1392(a), 1407.

2. The Safety Act's preemption section also does not provide a "reliable indicium" of Congress' intent to displace implied conflict preemption because it does not reflect all of the available evidence of Congress' thinking. The savings clause included in Section 1397(k) — which provides that compliance with a safety standard "does not exempt any person from liability under common law" — shows that Congress expected implied preemption to operate under the Safety Act. The savings clause was added to prevent implied *field* preemption from entirely displacing state law (see pages 12-14, *supra*), but Congress did not save state law claims from implied *conflict* preemption. Indeed, there would have been no need to adopt a savings clause at all if the mere existence of an express preemption clause foreclosed any implied preemption inquiry.

This Court has often warned that general savings clauses should not be construed in an indiscriminate fashion to allow common law actions that would subvert a federal regulatory scheme. In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. at 446, the Court held that a general savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

More recently, in *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494 (1987), the Court held that a general savings clause could not be invoked to save from preemption common law remedies that conflicted with a federal administrative scheme, noting that "we do not believe Congress intended to undermine this carefully drawn statute

through a general savings clause." See also *Morales*, 112 S. Ct. at 2037; *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986) (Court refuses to allow savings clause to impose "widely divergent state law" on federal "uniformity").

The lower court cases cited by respondents for the proposition that the Safety Act "does not preempt common law claims" (Br. in Opp. 11-12) support an interpretation of the savings clause as precluding only field (and not conflict) preemption. None of the cases cited presented a square conflict between a Federal Motor Vehicle Safety Standard and a state common law rule. In the absence of such a conflict, the savings clause authorizes a tort action to proceed because the Safety Act does not preempt the entire field of motor vehicle safety.[16] For example, several cases cited by respondents involved a claim that a motor vehicle's roof was improperly designed. Although FMVSS 216 prescribes "a minimum level of roof strength" (*Sours* v. *General Motors Corp.*, 717 F.2d at 1516-1517), it does not prescribe any design features (*id.* at 1516), and thus there is no conflict

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[16] In many of the cited cases, the courts merely recited or referred in passing to the language of the savings clause without considering the issue of implied conflict preemption — or even preemption generally. See, *e.g.*, *Chrysler Corp.* v. *DOT*, 472 F.2d 659 (6th Cir. 1972); *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). In other cases, there was no hint that any FMVSS even remotely related to the tort claim asserted, let alone conflicted with that claim. See, *e.g.*, *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976). In *Schwartz* v. *American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983), the court stated that "there were no federal standards governing the relevant portions of the" vehicle. See also *Dorsey* v. *Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981) (FMVSSs "are unrelated to several of the design deficiencies developed by the plaintiffs' evidence"), cert. denied, 459 U.S. 880 (1982).

between the federal standard and a defective design claim for a particular vehicle's roof.[17] As the Sixth Circuit noted in *Sours*, "utilization of officially approved design features * * * is far different from compliance with the threshold FMVSS 216 standard, which by its terms sets only a minimum level of roof strength." *Id.* at 1517. A common law tort action challenging roof design therefore is not impliedly preempted by FMVSS 216. *Ibid.*

3. Finally, a recent amendment to the Safety Act, not discussed by the court of appeals (although brought to its attention in the briefs of *amici*), provides further evidence that the court's conclusion on congressional intent is wrong. In reauthorizing the Safety Act in 1991, Congress explicitly ratified implied preemption in directing NHTSA to amend FMVSS 208 to require airbags in all new motor vehicles. Congress recognized that several courts had held that tort suits based on the failure to install airbags were impliedly preempted and that the "all airbag" amendment might be construed as disturbing those precedents. See Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086 (1991); H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. The 1991 amendment therefore specified that it

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Section 2508(d), 105 Stat. 2086. The conference report, citing the prior decisions finding for the manufacturers on the grounds of implied preemption, explained that Congress

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[17] See *Stonehocker* v. *General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978); *Shipp* v. *General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985).

"do[es] not want by this section to change the law on liability as it existed prior to enactment" (*i.e.*, late November 1991). H.R. Conf. Rep. No. 404 at 403, *reprinted in* 1991 U.S.C.C.A.N. at 1783. This legislation and its history show conclusively that Congress was aware of, and content with, the cases construing the Safety Act to allow implied preemption analysis. Contrary to the Eleventh Circuit's holding, the Safety Act's express preemption provision — in the face of this congressional ratification of the existence of the implied preemption doctrine under the Act — cannot possibly be a "reliable indicium" of Congress' intent to preclude an implied preemption inquiry.

In sum, the Eleventh Circuit's refusal to consider petitioners' implied preemption defense was plainly erroneous. This Court in *Cipollone* clearly did not intend to abolish that defense in the context of every statute containing an express preemption provision. And more specifically, the language and legislative history of the Safety Act offer compelling proof that Congress intended that implied preemption would remain available to ensure the national uniformity of safety standards and to prevent frustration of the federal scheme.

III. REVERSAL IS NECESSARY TO VINDICATE THE SUPREMACY OF FEDERAL LAW

If the interpretation of *Cipollone* urged by respondents is adopted, it will mean that state common law can impose duties that plainly frustrate federal objectives or even make it *impossible* to comply with federal law duties under the Safety Act and many other federal statutes, see pages 9-11, *supra*. This result is plainly unacceptable and contrary to the Supremacy Clause and almost two centuries of established preemption doctrine.

Yet, under respondents' rationale, this result is *required* whenever (1) the federal statute upon which the claim of preemption is based has an express preemption clause, and

(2) that clause, narrowly construed, does not encompass the state law obligation forming the basis for the plaintiff's claim. In that event, an implied preemption defense would be unavailable, even if "compliance with both federal and state regulations is a physical impossibility" or if "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 605 (1991) (citations and internal quotation marks omitted).

Moreover, this erroneous reading of *Cipollone* leads to the anomalous result that a federal statute would have greater preemptive force *without* a preemption clause than with one. For example, if the Safety Act had no express preemption clause, the Eleventh Circuit in this case would have applied its precedents and found implied conflict preemption. The *inclusion* of an express preemption clause in the statute, however, caused the court to reject implied federal preemption analysis entirely. Needless to say, courts should seek to avoid attributing such an absurd design to Congress. See *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988).

These unacceptable results flow directly from a plain misreading of *Cipollone* (on implied preemption) and refusal to follow *Cipollone* (on express preemption). By holding that state common law claims do not fall within a federal express preemption provision unless the provision refers specifically to the common law *and* that the mere presence of an express preemption provision bars any implied preemption inquiry, the court of appeals sanctioned a regime in which the states may wholly frustrate the purposes of a federal statutory scheme so long as they act through their common law.

Under this regime of divergent standards, members of ATA cannot know whether the trucks they put on the road meet all applicable legal requirements. Although the federal government decided — for safety reasons — to make antilock brakes optional on trucks and trailers, a jury in Georgia or

Maine or California might decide that antilock brakes are required to meet a common law duty of care. On the other hand, juries in Alabama or New Hampshire or Oregon might decide that antilock brakes are dangerous and breach common law standards in those jurisdictions. As President Johnson observed almost thirty years ago, "50 standards for 50 different states * * * would be chaotic." 112 Cong. Rec. 14,253 (1966). The adverse effects on safety and interstate commerce of nonuniform standards are clear.

Furthermore, the importance of this issue extends beyond national motor vehicle safety to drugs, medical devices, pesticides, and numerous other areas of federal health and safety regulation where federal uniformity is critical. For many of these regulatory schemes, in which members of NAM are vitally interested, the lower courts have already found federal preemption of inconsistent common law claims. See pages 9-11, *supra*. A contrary ruling in this case would undermine those regulatory programs in addition to the program of motor vehicle safety established by the Safety Act.

This Court should reverse the Eleventh Circuit's unprecedented misinterpretation of *Cipollone*, which would bring about "a radical reworking of our law" (*Osborne* v. *Ohio*, 495 U.S. 103, 119 (1990)), and reaffirm the supremacy of federal law over conflicting state law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1994

Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

No. 94-286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK AND EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae Product Liability Advisory Council, Inc. (the "Advisory Council") is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability.* Its members include many manufacturers—among them the Petitioners in this case—whose products are regulated by the National Traffic and Motor Vehicle Safety Act and by the safety standards promulgated under that Act. Its members also include manufacturers who are subject to other federal statutes that contain preemption provisions or saving clauses.[1] Accordingly, the Advisory Council has a strong interest in assisting the Court in interpreting the preemption provision of the Safety Act and clarifying the proper relationship between implied and express preemption.

STATEMENT OF STATUTORY AND REGULATORY FACTS

On September 9, 1966, Congress enacted Public Law 89-563, 80 Stat. 718, entitled "An Act to provide for a coordinated national safety program and establishment of safety standards for motor vehicles in interstate commerce to reduce accidents involving motor vehicles and to reduce the deaths and injuries occurring in such accidents" (the "Safety Act"). That purpose was to be accomplished through federal motor vehicle safety standards that would "meet the need for motor vehicle safety . . . ." 15 U.S.C. § 1392(a) (now codified at 49 U.S.C. § 30111(a)).[2]

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* Consent letters have been filed with the Clerk of this Court.

[1] A list of the members of *Amicus Curiae* Product Liability Advisory Council, Inc. is attached as Appendix A.

[2] This brief refers to the sections of the Safety Act as they were originally codified. The Safety Act was recently recodified at 49 U.S.C. sections 30101-69. The changes to those portions of the Act that are at issue in this case, however, were made for purposes of consistency, to eliminate surplusage, and to add clarity, and were not intended to be substantive. *See, e.g.*, Historical and Statutory Notes to 49 U.S.C. § 30103.

To ensure that the "coordinated national safety program" would not be undermined by inconsistent state standards, and that safety standards would be uniform nationwide, Congress included a preemption provision that prohibited states from establishing or maintaining state standards inconsistent with federal safety standards, except for vehicles equipped for a state's own use. That preemption provision, section 103(d) of the Safety Act (now 49 U.S.C. § 30103(b), as amended), stated:

> **Supremacy of federal standards; allowable higher standards for vehicles used by federal or state governments**
>
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment, any safety standard applicable to the same aspect of performance of such vehicle or item of equipment, which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any state or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

Section 103(d) is the Safety Act's preemption provision. It is entitled "Supremacy of federal standards," and the virtually identical preemption provision in the bill that was reported from committee in the Senate was entitled "Preemption." 112 Cong. Rec. 14,257 (1966). The sections of the conference and House reports discussing section 103(d) are entitled "Preemption." H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2731, 2732-33; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). The discussion of section 103(d) in the Senate report specifically states that inconsistent state standards "are preempted . . . ." S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. No other provision in the Safety Act refers to preemption or federal supremacy; no version of either the House bill or the Senate bill referred to any other provision as a preemption provision or as a federal supremacy provision; no Senate report, House report, or conference report referred to any other provision as a preemption provision or as a federal supremacy provision; and no one in the floor debates discussed preemption or federal supremacy in connection with any other provision.

Congress made it equally clear that section 103(d) was intended to ensure the uniformity of federally authorized motor vehicle safety standards by precluding states from establishing, or continuing in effect, inconsistent standards. The House report, for example, described the intent and purpose of the Safety Act's preemption provision as follows:

> *Preemption.*—. . . . [T]his preemption subsection [103(d)] is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966).

Similarly, in explaining the need for the preemption provision, the Senate Report emphasized:

> The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.

S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720.

In hearings on the Safety Act, legislators and witnesses repeatedly stressed that uniform national standards were essential for three reasons. First, the national scope of the problem of vehicle safety required a national response. For example, when Secretary of Commerce Connor was asked about the scope of authority granted to the Secretary of Transportation under title I of the Bill, he responded as follows:

> We think that the highway safety problem is a matter of great public concern, and national interest. We don't think that the objectives that have been defined can be accomplished on a piecemeal basis or by leaving the authority untouched that is now vested in the States and municipalities.

Traffic Safety: Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess., pt. 1, at 146 (1966) (hereafter "*House Hearings*") (statement of Hon. John T. Connor, Secretary of Commerce).

Second, uniform national standards were necessary because multiple and inconsistent state standards would "creat[e] chaos in the automotive industry." *House Hearings*, pt. 1, at 606 (statement of Hon. William D. Hathaway, United States Representative from Maine). As Senator Magnuson stated in the Senate debate on the Safety Act:

> The traffic safety legislation that I have sent the Congress will . . . establish a program of strict national standards for automobiles. I cannot stress too strongly the need for these standards.
>
> The only alternative is unthinkable—50 standards for 50 different States. I believe that this would be chaotic.

112 Cong. Rec. 14,254 (1966) (statement of Sen. Magnuson). Senator Ribicoff reiterated this theme in testimony before the House Committee on Interstate and Foreign Commerce, stating that "if there is any item in American life that we use in our society that has to have some national standards because of the very nature of the item, it is the automobile." *House Hearings*, pt. 1, at 574 (statement of Hon. Abraham Ribicoff, United States Senator from Connecticut).

Third, uniform national standards were mandated because the states were unable to develop appropriate safety standards:

> In simple language, we are forced to establish a Federal role in highway traffic safety because State and local authorities have been unable to do the whole job. . . . It's time that the ultimate authority of the Federal Government was exercised in the traffic safety field.

House Hearings, pt. 1, at 554, 559, 561 (statement of Hon. Abraham Ribicoff, United States Senator from Connecticut).

An issue that arose in the hearings on the Safety Act was whether the Act's preemption provision was intended to occupy the field and preclude all state laws relating to vehicle and traffic safety. The sponsors made it clear that preemption would apply only where the Federal Government chose to act. *See, e.g., Traffic Safety: Hearing on S. 3005 Before the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 65-66 (1966).

Congress made it equally clear that the Safety Act did not also establish compliance with federal safety standards as an affirmative defense in common law actions. It did so through section 108(c) of the Safety Act (now 49 U.S.C. § 30103(e)), which stated: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

The text and structure of the congressional reports on the Safety Act, and the discussion of section 108(c) in the floor debates, shed further light on the narrow role of section 108(c). First, section 108(c) is not included in section 103(d), the Safety Act's preemption provision,

but instead was located five sections later. Second, while the title of the preemption provision, section 103(d), was "Supremacy of federal standards," the title of section 108(c) was "Continuation of common law liability" and made no reference to preemption or federal supremacy. Third, the sections entitled "Preemption" in the congressional reports make no mention of section 108(c), and discuss only section 103(d). *See* H.R. No. 1919 at 16, *reprinted in* 1966 U.S.C.C.A.N. at 2732-33; H.R. Rep. No. 1776 at 17. The conference report does not even mention section 108(c), and the discussion of that section in the House report is contained under "Prohibited Acts and Exemptions." *See* H.R. Rep. No. 1776 at 22. Moreover, the discussions of sections 108(c) in the floor debates concerned evidentiary considerations, not preemption. *See, e.g.*, 112 Cong. Rec. 21,490 (1966); *id.* at 21,487.

SUMMARY OF THE ARGUMENT

The case before this Court demonstrates that the concerns that led Congress to preempt state standards inconsistent with federal safety standards would remain if section 108(c) were read, as the court of appeals read it, to preclude any application of either express preemption under section 103(d) or the doctrine of implied conflict preemption under any circumstances.

Section 103(d) of the Safety Act expressly preempts any state safety standard that is not identical to an applicable Federal Motor Vehicle Safety Standard. The court of appeals erred by refusing to find state common law safety standards expressly preempted because section 103(d) does not specifically refer to "common law claims." The notion that common law claims cannot be expressly preempted unless the preemption provision explicitly refers to "common law" is inconsistent with this Court's decision in *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, 112 S. Ct. 2608 (1992), and with numerous decisions by this Court interpreting the phrases "state standard" and "state safety standard" to include state common law.

The court of appeals also erred in treating section 108(c) of the Safety Act, the Act's no-compliance defense clause, as a preemption provision. It is not. The language and structure of the Safety Act, its legislative history, and the method chosen by Congress to achieve the purpose of the Safety Act, demonstrate that section 108(c) was only intended to negate the affirmative defense of compliance with governmental standards and is not, and was not intended to be, a preemption provision or a general saving clause. Moreover, if section 108(c) is construed as a saving clause, an unbroken line of decisions by the Court holds that general saving clauses preclude only field preemption.

Finally, the court of appeals erred in holding that implied preemption analysis cannot be considered when a statute contains an express preemption provision. That construction is inconsistent with this Court's recent decisions in *Cipollone* and *CSX Transportation, Inc. v. Easterwood*, —— U.S. ——, 113 S. Ct. 1732 (1993).

ARGUMENT

THE SAFETY ACT PREEMPTS STATE COMMON LAW STANDARDS THAT CONFLICT WITH AN ON-POINT FEDERAL MOTOR VEHICLE SAFETY STANDARD

The Supremacy Clause requires that all conflicts between federal and state law be resolved in favor of the federal law. U.S. Const. art. VI, cl. 2. As this Court repeatedly has held, federal supremacy prohibits the enforcement of *any* state law that conflicts with the exercise of federal power. *E.g., Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982).

Preemption of state law can arise from federal regulations or from federal statutes. *See, e.g., Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986).

Moreover, the imposition of damages under state tort law repeatedly has been held to be a form of state regulation subject to preemption:

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Cipollone, 112 S. Ct. at 2620 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). *Accord International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 327 (1981).

Federal preemption can occur in any of three ways. First, Congress may expressly state an intent to preempt state law. *E.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Second, Congress may otherwise indicate an intent to occupy an entire field of regulation, in which case the states still must leave all regulatory authority in that area to the Federal Government. *E.g., de la Cuesta*, 458 U.S. at 158. Third, a state law that conflicts with a federal statute or regulation is to that extent impliedly preempted, either when it would be impossible to comply with both the federal and state laws or when the state law stands " 'as an obstacle to the accomplishment of the full purposes and objectives of Congress.' " *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 260 (1985) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)). Even if a state law is intended to further the federal law's primary substantive goal, the state law is preempted if it conflicts with the methods chosen by the Federal Government to achieve that goal:

> [I]t is not enough to say that the ultimate goal of both federal and state law is [the same]. A state law also is preempted if it interferes with the *methods* by which the federal statute was designed to reach this goal.

Ouellette, 479 U.S. at 494 (emphasis added).

In this case, the court of appeals erred both in its articulation of these preemption principles and in its interpretation of the Safety Act. A proper application of the preemption principles established by this Court shows that the state common law standard asserted by Respondents is expressly preempted because of the existence of Federal Motor Vehicle Safety Standard 121, which the Ninth Circuit has recognized as a design standard, *see Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632, 639 n.26 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), and that the decision below should be reversed.

I. THE SAFETY ACT EXPRESSLY PREEMPTS STATE COMMON LAW STANDARDS THAT CONFLICT WITH AN ON-POINT FEDERAL MOTOR VEHICLE SAFETY STANDARD

Section 103(d) is clear and unambiguous. It provides that when the Secretary of Transportation has chosen to promulgate a safety standard governing a particular aspect of motor vehicle performance, *any* state safety standard applicable to the same aspect of performance or item of equipment is preempted unless it falls within one of two statutory exceptions: when the state standard is "identical to the Federal standard," or when the state standard applies only to "vehicles procured for that government's own use . . . ."

Thus, the analysis for determining express preemption under the Safety Act is limited to three questions: First, is there a federal safety standard governing the aspect of performance or item of equipment at issue in effect? Second, is the state seeking to establish or maintain a state standard applicable to the same aspect of perform-

ance or item of equipment of such vehicle? Third, does the state standard fall outside the two statutory exceptions provided in section 103(d)? If the answers are all affirmative, the state standard is preempted.

Here, the court of appeals did not undertake the required analysis. Instead, it first observed that in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), it had held that common law claims cannot be expressly preempted by section 103(d), and it then stated that *Taylor*'s analysis of express preemption was "unchanged by" *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, 112 S. Ct. 2608 (1992). *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521 (11th Cir. 1994).

In truth, however, the express preemption analysis used in *Taylor* was erroneous, and *Cipollone* made this clear. This Court in *Cipollone* squarely rejected *Taylor*'s holding that a preemption provision cannot expressly preempt any common law claim unless the preemption provision explicitly refers to the "common law."

The preemption provisions at issue in *Cipollone* were in the Federal Cigarette Labeling and Advertising Act ("the 1965 Act") and the Public Health Cigarette Smoking Act of 1969 ("the 1969 Act"). The preemption provision of interest here is that of the 1969 Act, which stated:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334(b), as amended.

The preemption provision of the 1969 Act made absolutely no mention of "common law claims" or "common law" of any other sort, but instead contained only the phrase "no requirement or prohibition." Nonetheless, this Court found that the preemption provision expressly pre-

empted a variety of common law actions, as well as regulations and statutes.

In explaining why the 1965 Act, unlike the 1969 Act, did not preempt common law actions, the Court emphasized that the 1965 Act expressly stated that its purpose was only to prevent nonuniform "regulations":

> This reading comports with the 1965 Act's statement of purpose, which expressed an intent to avoid "diverse, nonuniform, and confusing labeling and advertising *regulations* with respect to any relationship between smoking and health." . . . . [T]he term "regulation" most naturally refers to positive enactments by the bodies [of legislatures and agencies], not to common law damage actions.

Cipollone, 112 S. Ct. at 2619 (emphasis in original). The Court then observed that, in contrast, the 1969 Act's preemption provision was *not* expressly limited to "regulations," but instead addressed state "requirements and prohibitions," and therefore preempted common law actions as well as regulations:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply "statements" but rather "requirement[s] or prohibition[s] . . . imposed under State law."

Id. The Court then further explained:

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Id. at 2620 (quoting *Garmon*, 359 U.S. at 247).

The Court's preemption analysis in *Cipollone* is equally applicable here. The word "regulation" appears nowhere

in the Safety Act's preemption provision or statement of purpose. Thus, there is no basis for reading the preemption provision's use of the all-encompassing term "any safety standard" to mean only "any *regulatory* safety standard."

Also, like the 1969 Act's phrase "[n]o requirement or prohibition," the Safety Act's phrase "any safety standard" is one that "sweeps broadly and suggests no distinction between positive enactments and common law" and "easily encompass[es] obligations that take the form of common law rules." And it is as true here as it was in *Cipollone* that the intent of the preemption provision would be thwarted if the provision were held inapplicable to common law standards, because "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

There can be no doubt that common law rules are state standards. For decades this Court has explicitly referred to common law rules as "state safety standards" or "state standards." *See, e.g., Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 114-15 (1987) (referring to "state safety standards" set by California products liability common law); *Ouellette,* 479 U.S. at 496 n.17 (recognizing the "possibility that [the defendant] will have to meet a number of different standards" if sued under different states' common law); *Silkwood,* 464 U.S. at 256 (referring to "imposition of a state standard in a damages action"); *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law). Thus, the Court has repeatedly confirmed that the ordinary meaning of "state standards" includes judicial, not just regulatory or statutory, standards.

The Court in *Cipollone* also rejected the argument that state common law standards were not obligations or requirements "imposed under State law." 112 S. Ct. at 2620. The Court declared:

> At least since *Erie R. v. Tompkins,* 304 U.S. 64 (1938), we have recognized the phrase "state law" to include common law as well as statutes and regulations.

Id. Thus, section 103(d)'s prohibition of any action to establish a state standard conflicting with a directly applicable federal safety standard includes actions by courts, as well as actions by legislatures and regulatory agencies.

In addition, in a case decided the year after *Cipollone*, this Court once again held that an express preemption provision in a federal statute preempted certain common law tort claims even though the preemption provision made no reference to "common law claims" or "common law actions" or "common law" in any other context. *See CSX Transp., Inc. v. Easterwood,* —— U.S. ——, 113 S. Ct. 1732 (1993) (interpreting preemption provision of Federal Railroad Safety Act of 1970, 45 U.S.C. §434).[3]

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[3] Although the National Traffic and Motor Vehicle Safety Act defines the phrase "Motor vehicle safety standards" as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance," the word "minimum" does not mean that the standards established under the Safety Act are only minimal. In fact, the National Highway Traffic Safety Administration has explicitly rejected such an interpretation of the word "minimum":

> The word "minimum" in the standard definition of motor vehicle safety standards . . . does *not* refer to the substantive content of the standards but rather to their legal status—that the product covered must not fall short of them.

41 Fed. Reg. 2392 (Jan. 16, 1976) (emphasis added). The Safety Administration could not have ruled otherwise, because the Safety Act requires every safety standard to protect the public against "unreasonable risk of death or injury" and to "meet the need for motor vehicle safety." 15 U.S.C. § 1391(1).

In fact, the Safety Administration has specifically stated that its mission is to establish "optimum," not minimal, standards:

> This office has the responsibility for formulating and developing Federal Motor Vehicle Safety Standards *which establish requirements for optimum crash and postcrash protection* of vehicle occupants, pedestrians and cyclists.

National Highway Traffic Safety Administration Motor Vehicle Programs, *Program Plan for Motor Vehicle Safety Standards* at 3 (October 1971) (emphasis added).

This Court likewise has recognized that a federal statute's reference to standards promulgated under the statute as "minimum

Finally, in *Cippollone* this Court observed that Congress had expressly stated what was to be preempted, that "the other provisions of the 1965 and 1969 Acts offer no cause to look beyond [the express preemption provisions]," and that "the familiar principle" of *expressio unius est exclusio alterius* therefore made it inappropriate to preempt anything other than what Congress had chosen to specify. 112 S. Ct. at 2618.

The principle of *expressio unius est exclusio alterius* is equally applicable to the Safety Act's preemption provision. When the Secretary of Transportation has chosen to promulgate a safety standard governing a particular aspect of motor vehicle performance, the first sentence of section 103(d) broadly prohibits every state from establishing "*any* safety standard applicable to the same aspect of performance" unless the state standard is "identical to the Federal standard." The second and third sentences of section 103(d) are saving clauses that specify the *only* exemptions from that express preemption. The second sentence allows the states to "enforc[e] any safety standard which is identical to a Federal safety standard." The third sentence allows "the government of any State or political subdivision thereof" to establish, *for vehicles procured for that government's own use*, standards that "impose[] a higher standard of performance than that required to comply with the otherwise applicable Federal standard." This is the full extent of the preemption provision.

The two saving clauses in the preemption provision show that Congress well knew how to carve out exceptions to that provision. Because no other exception appears within the preemption provision, the doctrine of *expressio unius est exclusio alterius* dictates that no other should be implied. *See also United States v. Rutherford*, 442 U.S. 544, 552 (1979) ("Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole.").

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standards" does not mean that the states are free to impose more stringent standards. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978).

II. SECTION 108(c) OF THE SAFETY ACT DOES NOT PRESERVE STATE COMMON LAW SAFETY STANDARDS THAT CONFLICT WITH AN ESTABLISHED FEDERAL MOTOR VEHICLE SAFETY STANDARD

In addition to the preemption provision, the Safety Act contains a later provision, section 108(c), that states: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c). In *Taylor* the Eleventh Circuit incorrectly ruled that common-law claims could not be expressly preempted because the language of section 108(c) appeared to conflict with the language of the Act's preemption provision, section 103(d). As shown below, in determining congressional preemptive intent, the *Taylor* court should have recognized that section 108(c) only negates the affirmative defense of compliance with government standards, not preemption, and that, at most, section 108(c) negates field preemption, not preemption where state law conflicts with an on-point federal standard.

The court of appeals below went several wrong steps further. First, the court mischaracterized section 108(c) as a preemption provision. *Myrick*, 13 F.3d at 1526. As shown below, however, the language and structure of the Safety Act, its legislative history, and the method chosen by Congress to achieve the purpose of the Safety Act, demonstrate that section 108(c) is not, and was not intended to be, a preemption provision.

Second, after erroneously elevating section 108(c) to the status of a preemption provision, the court of appeals compounded that error by ignoring the Safety Act's true preemption provision completely, and instead ruled that section 108(c) alone constituted a "reliable indicium" of congressional intent not to preempt common law claims.

Myrick, 13 F.3d at 1525-26. If section 108(c) is to be considered in conjunction with the Safety Act's true pre-emption provision, section 103(d), that consideration precludes a finding that section 108(c) creates a "reliable indicium" of congressional intent.

A. The Language and Structure of the Safety Act Demonstrate That Section 108(c) Is Not, and Was Not Intended to Be, a Preemption Provision

The court of appeals below mischaracterized section 108(c) as a preemption provision, and stated:

> We are concerned with what Congress expressly stated about pre-emption, and in the Safety Act, Congress put its statements about pre-emption in two statutory provisions, one of which we refer to as a pre-emption clause and the other one of which we call a savings clause. Our terminology notwithstanding, both of the clauses are pre-emption provisions in the material sense of the word, because both clauses explicitly deal with the subject of what is and is not pre-empted. Our rejection of this argument finds support in the *Easterwood* decision, because that case also involved not only a pre-emption clause but also a savings clause.

Myrick, 13 F.3d at 1526. The court of appeals was wrong in stating that section 108(c) "explicitly deal[s] with the subject of what is and what is not pre-empted" and in stating that the *Easterwood* decision supported the court's conclusions. The truth is, section 108(c) does *not* "explicitly deal with the subject of what is and is not is pre-empted," and *Easterwood* plainly *undermines* the court of appeals' opinion.

First, the true preemption provision, section 103(d), is explicitly entitled "Supremacy of federal standards," but section 108(c) has a title that makes no reference, explicit or otherwise, to the Supremacy Clause or to preemption. Section 108(c) is simply entitled "Continuation of common law liability." *See I.N.S. v. National Ctr. for Immigrants' Rights, Inc.*, —— U.S. ——, ——, 112 S. Ct. 551, 556 (1991) (title of a statute or section can aid in resolving ambiguity in legislation's text).

Second, as the court of appeals correctly recognized in *Wood v. General Motors Corp.*, 865 F.2d 395, 401 n.8, 417-18 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), the language of section 108(c) definitively is *not* the language commonly employed by Congress in saving clauses intended to restrict the scope of preemption. Instead, the language of section 108(c) is language that refers to and negates compliance with a government standard as an affirmative common law defense. There is no explicit reference to preemption or to the limits of federal supremacy.

The narrow language of section 108(c), which refers to "[c]ompliance with any Federal motor vehicle safety standard," differs dramatically from the encompassing saving-clause language that Congress used both in the preemption provision of the Safety Act itself and in numerous other statutes when it intended to restrict the scope of preemption. Thus, for example, in the true express preemption provision of the Safety Act, section 103(d), Congress explicitly incorporated two saving-clause exceptions to the preemptive first sentence of that provision. Each of the two saving-clause sentences begins with the clear, unambiguous, and traditional anti-preemption saving language, "Nothing in this section shall be construed . . . ." The two savings clauses in the preemption provision state:

> *Nothing in this section shall be construed* as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. *Nothing in this section shall be construed* to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use. If such requirement imposes a higher standard of

performance then that required to comply with the otherwise applicable Federal standard.

(Emphasis added).

The saving clauses in virtually every other case decided by this Court in this century, both before and after *Cipollone*, have used similar encompassing language, *not* the narrow, affirmative-defense-oriented "compliance with" language of section 108(c).[4]

[4] *See e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, —— U.S. ——, 114 S. Ct. 517, 525 (1993) (interpreting saving clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities"); *Morales v. Trans World Airlines, Inc.*, —— U.S. ——, 112 S. Ct. 2031, 2034 (1992) (interpreting saving clause of Federal Aviation Act of 1958, 49 U.S.C. § 1506, which states, "Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."). *Cipollone*, —— U.S. ——, 112 S. Ct. at 2618 (referring to saving clause of Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406(c), which states, "Nothing in this Act shall relieve any person from liability, under common law or under State statutory law, to any other person."); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (interpreting saving clauses of 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-7 and 2000h-4; the first of these provides, "Nothing in this title shall be deemed to exempt or relieve any person from any liability . . . provided by any present or future law of any State . . . ."; the second states, "Nor shall any provision of this Act be construed as invalidating any provision of State law"); *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978) (interpreting saving clause of 1958 Disclosure Act, 29 U.S.C. § 301, which states, "The provisions of this Act . . . shall not be held to exempt or relieve any person from any liability . . . provided by any present or future law of . . . any State . . . ."); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210 (1986) (interpreting saving clause of Death on the High Seas Act, 46 U.S.C. § 767, which states, "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Chapter."). *See also Gade v. National Solid Wastes Management Ass'n*, —— U.S. ——, 112 S. Ct. 2374, 2382, 2384 (1992) (29 U.S.C. §§ 653(b)(4) and 667(a), the saving clauses in the Occupational Health and Safety Act); *California v. F.E.R.C.*, 495 U.S. 490, 497 (1990) (16 U.S.C. § 821, the saving clause in the Conservation, Regulation of Power, and Water Rights Act); *Mansell v. Mansell*, 490 U.S. 581, 600 (1989) (10 U.S.C. § 1408(e)(6), the saving clause in the Uniformed Services Former Spouses' Protection Act); *Ouellette*, 479 U.S. 481, 485, 493 (1987) (33 U.S.C. §§ 1365(e), 1370, the saving clauses in Navigation and Navigable Waters Act, Pollution Prevention Act); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 733 (1985) (29 U.S.C. § 523(a), the saving clause in National Labor Relations Act); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 7 n.11, 14-15, 29 (1981) (38 U.S.C. § 1415(g)(5), the saving clauses in Navigation and Navigable Waters Act, Ocean Dumping Act); *Head v. New Mexico Bd. of Examiners in Optometry*, 874 U.S. 424, 443-44 (1963) (47 U.S.C. § 414, the saving clause in Wire or Radio Communication, Administration Provisions Act); *Northwest Airlines, Inc. v. County of Kent, Mich.*, —— U.S. ——, 114 S. Ct. 855, 862 (1994) (49 U.S.C. § 1513(b), the saving clause in Federal Aviation Program Act); *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962) (49 U.S.C. § 316, the saving clause in Motor Carriers, Rates, Fares and Charges Act, repealed Pub. L. 95-473, § 4(b), Oct. 17, 1978; Pub. L. 97-449, § 7(b), Jan. 12, 1983, 96 Stat. 2444); *Jones v. Rath Packing Co.*, 430 U.S. 519, 534, 537 (1977) (15 U.S.C. § 1460, the saving clause in Fair Packing and Labeling Program Act); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981) (49 U.S.C. § 22, the saving clause in Interstate Commerce Act).

This undeniably stark difference between the affirmative-defense "compliance with" language of section 108(c) and the preemption-addressing saving language used in section 103(d) and in numerous other statutes cannot properly be ignored. As this Court has emphasized, "Normal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ." *Offshore Logistics*, 477 U.S. at 222.

The court of appeals further erred in its express preemption analysis by ignoring one of the cardinal principles articulated in *Easterwood*, where this Court reaffirmed the established principle that, in interpreting an express preemption provision, "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue." *Easterwood*, 113 S. Ct. at 1737. The Court's emphasis

on the importance of examining statutory structure as well as statutory language was not new in *Easterwood*; rather, the Court had emphasized the interpretive importance of structure before that case and before *Cipollone*. *See, e.g., Gade v. National Solid Wastes Mgt. Ass'n*, —— U.S. ——, 112 S. Ct. 2374, 2383, 2390 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

Here, the structure of the Safety Act, like the language itself, shows that section 108(c) was never intended to be the sweeping exception to section 103(d) that the court erroneously found it to be. Section 108(c) appears five full sections after the true preemption provision—namely, the provision whose title explicitly refers to "Supremacy of federal standards." That structural fact alone should have given the court of appeals pause. But the court of appeals' interpretation is still further undermined by the additional structural fact that section 103(d) contains two, and only two, explicit saving clauses, each of which uses traditional saving clause language. This additional structural fact suggests that, if Congress had intended the substance of section 108(c) to constitute a third—and the most sweeping—exception to the preemption provision in the first sentence of section 103(d), Congress would have included the language of section 108(c) in its logical place, adjacent to the other two explicitly stated saving clauses in the statute labeled "Supremacy of federal standards." Inescapably, section 108(c) is not a true saving clause.

This Court also has emphasized the interpretive importance of the location of saving language relative to preemptive language. In *Easterwood* the Court stated, "The pre-emptive effect of these regulations is governed by § 434, which contains express saving and pre-emption clauses." *Easterwood*, 113 S. Ct. at 1736. The Court then emphasized that the preemption provision was "a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses." *Easterwood*, 113 S. Ct. at 1738. Here, in stark contrast, no such

solicitude for state law appears; the Safety Act's preemption provision, section 103(d), is *neither* prefaced *nor* succeeded by an express saving clause for common law actions. Indeed, the "[c]ompliance with" language relied on by the court of appeals appears fully five sections after the preemption provision.[5]

B. The Legislative History of the Safety Act Demonstrates That Section 108(c) Is Not, and Was Not Intended to Be, a Preemption Provision

The treatment of section 108(c) in the House and Conference reports, and in the floor debates, further demonstrates that section 108(c) is not, and was not intended to be, a preemption provision.[6] Both the House and conference reports contain sections entitled "Preemption." *See* H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2731, 2732-33; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). Neither of those sections, however, discusses or even mentions section 108(c). They discuss only section 103(d), the Safety Act's true preemption provision. The House report discusses section 108(c) seven pages later under the heading "Prohibited Acts and Exemptions," and the conference report does not even mention section 108(c).

If Congress had intended section 108(c) to be a preemption provision or a true saving clause, the House

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[5] That section 108(c) is not, and was not intended to be, a preemption provision or a true saving clause is further demonstrated by the 1994 recodification of the Safety Act. Section 103(d), the Safety Act's true preemption provision, is recodified at 49 U.S.C. section 30103(b), which is entitled "Preemption." Section 108(c), however, is not included in that subsection entitled "Preemption," but is three subsections away, in a subsection entitled "Common law liability." *See* 49 U.S.C. section 30103(e). If Congress had intended or recognized section 108(c) to be a preemption provision, Congress would have recodified section 108(c) under the subsection explicitly entitled "Preemption."

[6] Because section 108(c) was added to the Senate bill after the House and Senate conference, the Senate report contains no discussion of the savings clause.

and conference reports would have discussed that section under the preemption sections—as the reports did for the two exceptions to preemption of state standards contained in section 103(d)—rather than seven pages later under an entirely different heading. Further, if Congress had intended section 108(c) to be a sweeping new exception to the preemption provision, Congress would at least have mentioned section 108(c) in the conference report.

The fact that Congress did not view section 108(c) as a preemption provision is further demonstrated by Senator Magnuson's description of it to the Senate after the House-Senate conference:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules of evidence are intended to be altered by this provision.

112 Cong. Rec. 21,487 (1966). The "principle developed in the Senate report" to which Senator Magnuson referred is that Federal safety standards "*need not* be interpreted as restricting State common law standards of care," and that "[c]ompliance with such standards would thus *not necessarily* shield any person from product liability at common law." S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added). In other words, the addition of section 108(c) was merely intended to clarify that the Safety Act did not create an affirmative defense of compliance with government standards or, at most, that the Safety Act's preemption provision does not occupy the field, and thus does not "*necessarily*" protect a common law defendant. If section 108(c) *always* prevented preemption of *any* common law claim, the words "not necessarily" and "need not" would be not merely

superfluous, but internally inconsistent. If on the other hand, section 108(c) precludes only field preemption, or negates mere compliance with existing government standards as a complete defense at trial, the quoted legislative history is sensible and precise.

C. Even if Viewed as a Saving Clause, Section 108(c) Precludes Only Field Preemption, and Does Not Preclude Preemption Where There Is a Conflict Between On-Point Federal Law and the Asserted State Law

We have shown that the Safety Act's express preemption provision is section 103(d) and that the court of appeals erred in calling section 108(c) a preemption provision and a saving clause. But even if section 108(c) were to be viewed as a saving clause, the court of appeals still would have to be reversed because of that court's failure to follow this Court's decisions, from *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) to *International Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987), holding that general saving clauses preclude only field preemption, not preemption based on a conflict between state and federal law.

Courts must assume that Congress is aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990). Accordingly, it must be assumed that, when Congress enacted the Safety Act, it knew that in the previous half-century this Court had consistently ruled that general saving clauses cannot be interpreted to authorize state common law causes of action that conflict with federal regulatory policies. Rather, such saving clauses are included only because, without them,

> "it might have been claimed that, Congress having entered the field, the whole subject of liability . . . had been withdrawn from the jurisdiction of the state courts," so [the savings clause] was added to make plain that the Act "was not intended to deprive the state courts of their general and concurrent jurisdiction."

Kalo Brick, 450 U.S. at 328 (quoting *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915)).

In *Abilene Cotton*, for example, the Court held that the Interstate Commerce Act precluded a common law action for damages for unjust and discriminatory rates, notwithstanding the Act's broad saving clause, which stated:

> Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

Recognizing the tension between the saving language and the broader purposes of the federal regulatory scheme, the Court held that the saving clause "cannot in reason be construed as continuing . . . a common law right" inconsistent with the underlying federal aims. 204 U.S. at 446.

Further, in *Pennsylvania Railroad v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915), the Court held that a general saving clause did not prevent preemption, but instead served only to preserve rights under state law that were consistent with the purposes of the federal statute. *Accord Ouellette*, 479 U.S. at 492-94; *Kalo Brick*, 450 U.S. at 331; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 473-74 (1959).

In *International Paper Co. v. Ouellette*, this Court reconfirmed that a general saving clause cannot preserve an otherwise preempted claim. The Court there held a state common-law tort action to be preempted by federal law despite the existence of two saving clauses in the relevant federal statute. The primary basis for the preemption holding was the Court's observation that such common law suits would destroy uniformity, allow states to "do indirectly what they could not do directly," and "exacerbate the vagueness and resulting uncertainty" that had existed. 479 U.S. at 495-96. The Court concluded:

> It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.

Id. at 497.

The same holds true here. The Safety Act was intended to achieve a uniform, national approach to vehicle safety. It would be "extraordinary for Congress . . . to tolerate common-law suits" that would "undermine this regulatory structure." Given this Court's repeated holdings that saving clauses only preclude field preemption, it is difficult to understand how the court of appeals, had it considered these precedents, could have given Section 108(c) such sweeping scope.

In sum, the language and structure of the Safety Act, its legislative history, the method chosen for achieving the statutory purpose, and almost a century's worth of decisions by this Court demonstrate that section 108(c) does not, and was not intended to, preclude preemption of common law standards that conflict with on-point federal safety standards. Had the court of appeals considered all of this, it would have found that the Safety Act expressly preempts claims that attempt to establish a state common law standard that conflicts with an existing federal standard such as Federal Motor Vehicle Safety Standard 121, which grants an *option* to install a certain design safety feature.[7] The Safety Administration's implementation of an optional braking design standard stemmed from the federal interest in promoting vehicle safety.[8] To permit plaintiffs to seek damages

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[7] The district court in *Myrick* explained that the Safety Administration's amendments to Safety Standard 121 following the Ninth Circuit's decision in *Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), were "intended to preserve the option of *not* installing anti-lock braking devices until such devices had been improved and subjected to further testing." *Myrick v. Fruehauf Corp.*, 795 F. Supp. 1139 (N.D. Ga. 1992). Respondents' claims, however, seek to abrogate that option.

[8] The Ninth Circuit concluded that "many vehicles equipped with antilocks were potentially more dangerous in performance than

under state law from a manufacturer that exercised its option not to use a device whose reliability has been questioned under federal law would conflict with the federal purpose.

III. THE COURT OF APPEALS FURTHER ERRED IN HOLDING THAT IMPLIED PREEMPTION ANALYSIS WAS AUTOMATICALLY PRECLUDED BECAUSE THE SAFETY ACT CONTAINS AN EXPRESS PREEMPTION PROVISION

We have shown that the court of appeals erred in its interpretation of the express preemption principles articulated by this Court in *Cipollone*. The court of appeals' treatment of implied preemption was equally flawed. The court held that, because the Safety Act contains an express preemption provision, *Cipollone* precludes any application of implied preemption, even if the state standard in question conflicts with the federal policies and purposes underlying the Safety Act and its implementing regulations. The court's conclusion that *Cipollone* thus tacitly overturned decades of implied preemption cases, without even bothering to mention them is contrary to this Court's fidelity to *stare decisis* and is based on a completely erroneous view of *Cipollone*'s language.

The language on which the court of appeals relied for its view that *Cipollone* dramatically changed implied-preemption law is as follows:

> Where a federal statute contains an express pre-emption clause, and that clause "provides a 'reliable indicium of congressional intent with respect to state authority,'" a court should not consider implied theories of pre-emption.

Myrick, 13 F.3d at 1521, quoting *Cipollone*, 112 S. Ct. at 2618. Neither the language used nor the principle

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pre-Standard vehicles. *Paccar*, 573 F.2d at 643. Thus, the court-ordered suspension of the requirement was designed to further the safety goals of the Safety Act, by seeking to ensure that the mandate did not "produce a more dangerous highway environment than that which existed prior to governmental intervention." *Id.*

espoused was new, much less an engine for upheaval of the entire preemption firmament. Five years earlier, in *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 282 (1987), this Court stated:

> [T]here is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two [preemption] sections provide a "reliable indicium of congressional intent with respect to state authority" to regulate employment practice.

Similarly, nine years before *Guerra* the Court stated:

> If the Pension Act is pre-empted here, the congressional intent to do so must be *implied* from the relevant provisions of the labor statutes. We have concluded, however, that such implication should not be made here and that a far more reliable indicium of congressional intent with respect to state authority to regulate pension plans is to be found in § 10 of the Disclosure Act.

Malone v. White Motor Corp., 435 U.S. 497, 505 (1978).

Not only did the court of appeals thus err in asserting that *Cipollone* had articulated a new preemption test, but the court then compounded its error by ignoring the very language it had quoted and by asserting that *Cipollone* established "that when there is an express preemption provision [in a federal statute], we should not consider implied preemption . . . ." *Myrick*, 13 F.3d at 1522. *Cipollone* established no such thing. Like *Guerra* and *Malone* before it, *Cipollone* merely said that a court must *first* look to the express preemption provision, and *if* that provision provides "a reliable indicium of Congressional intent," *then* there is no need to look elsewhere. *Cipollone*, 112 S. Ct. at 2618. In fact, in the unanimous decision in *Easterwood* the year after *Cipollone*, this Court reaffirmed that basic principle, stating:

> If the statute contains an express pre-emption clause, the task of statutory construction must *in the first instance* focus on the plain wording of the clause,

> which necessarily contains the best evidence of Congress' pre-emptive intent.

Easterwood, 113 S. Ct. at 1737 (emphasis added).

The court of appeals' distortion of *Cipollone*'s language is even more indefensible because it assumes that this Court in *Cipollone* established a new preemption rule that tacitly overruled all of the prior cases in which the Court had found implied preemption when an express preemption provision existed. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-40 (1990); *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-43 (1977). The court of appeals thus also necessarily presumed that this Court had simply ignored its repeatedly articulated fidelity to *stare decisis*. *See, e.g., Lee v. Weisman*, —— U.S. ——, 112 S. Ct. 2649, 2655 (1992); *Allied-Signal, Inc. v. Director, Div. of Taxation*, —— U.S. ——, 112 S. Ct. 2251, 2261-62 (1992). Indeed, the court of appeals presumed that this Court ignored *stare decisis* without saying that it was doing so, much less why it was doing so, and chose to overrule decades of precedents without mentioning them or acknowledging the upheaval being wrought. Those presumptions are, quite simply, untenable.

When the court of appeals asked whether the Safety Act's preemption provision provided a "reliable indicium of Congressional intent," it also committed the same interpretive errors that infected its express preemption discussion. In particular, it treated section 108(c) as an express preemption provision and asked whether *it* provided a reliable indicium of Congress' intent. As already shown above, that characterization of section 108(c) is entirely unsupportable. The court of appeals thus turned the requisite *Cipollone* analysis on its head by seeking the reliable indicium of congressional intent with respect to preemption not in the actual preemption provision, but in a provision that the court illogically and unjustifiably chose to call a preemption provision.

The court of appeals also erred by assuming that the only alternative to the sweeping scope it gave to section

108(c) was an interpretation that would make section 108(c) redundant—namely an interpretation that would have section 108(c) preserve only common law actions based on allegations of defects in features not addressed by any federal safety standard. Because the preemption provision in section 103(d) applies only when there is an applicable federal safety standard, the court of appeals was able to observe that such an interpretation of section 108(c) would make it meaningless.

But that is a strawman argument. Section 108(c) can and should be given a nonredundant interpretation that is more consistent with its own language, more consistent with the language of section 103(d), and more consistent with this Court's preemption principles. Section 108(c) should be read to negate the affirmative defense of compliance with a safety standard, as its language plainly suggests. If it is to be read as a preemption-limiting provision, it should be read in the manner that this Court has always read general savings clauses—namely, as a negation of field preemption, not as a negation of conflict preemption. It was only by focusing on an indefensible alternative interpretation, and ignoring the sensible alternatives, that the court of appeals was able to make its own strained interpretation of section 108(c) seem preferable.

The error in the court of appeals' view that section 108(c) precludes *any* preemption, express or implied, of *any* common law claim is even more forcefully shown by applying that view to the Safety Administration's recent regulation governing warnings about airbag dangers. On September 2, 1993, the Safety Administration promulgated a regulation specifying detailed, exact warnings that must be placed on the sun visors of all new passenger cars beginning on September 1, 1994. 58 Fed. Reg. 46551, 46564 (Sept. 2, 1993). In the same regulation, the Safety Administration explicitly prohibited all manufacturers from including any other airbag warning language on the sun visors, explaining that the resulting plethora of language would impair the effectiveness of

the required warnings. *Id.* at 46554-55, 46564. Under the court of appeals' overexpansive view of section 108(c), plaintiffs throughout the nation could nevertheless sue manufacturers for compensatory and punitive damages for not including additional warnings about airbag dangers, even though the manufacturers could not include the additional warnings without violating federal law. As this Court stated in *Kalo Brick,* 450 U.S. at 321-22, 325-26, and in *Ouellette,* 479 U.S. at 493-97, it is simply inconceivable that Congress intended to permit the individual states so seriously to thwart federal policies and purposes through the common law.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

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APPENDIX

APPENDIX A

LIST OF PRODUCT LIABILITY ADVISORY COUNCIL CORPORATE MEMBERS

Aluminum Co. of America
American Automobile Manufacturers Ass'n
American Home Products Corp.
American Suzuki Motor Corp.
Amsted Industries Incorporated
Andersen Corporation
Anheuser-Busch Companies, Inc.
AT&T
Atlantic Richfield Co.

Baxter International
Beech Aircraft Corp.
Black & Decker Corp.
Bridgestone/Firestone, Inc.
Bristol-Meyers Squibb Co.
British Aerospace
Burroughs Wellcome Co.

Caterpillar, Inc.
Chrysler Corp.
Ciba-Geigy Corp.
Clark Material Handling Co.
Coca-Cola Co.

Dana Corporation
Deere & Co.

Eaton Corp.
Eli Lilly and Co.
Emerson Electric Co.
Estee Lauder Cos.
Exxon Corp.

Federal-Mogul Corp.
FMC Corp.
Ford Motor Co.
Freightliner Corp.

General Electric Co.
General Motors Corp.
General Tire, Inc.
Goodyear Tire & Rubber Co.
Great Dane Trailers, Inc.

Harnischfeger Industries
Hoechst Colanese Chemical Group, Inc.
Honda North America, Inc.
Hyundai Motor America

Ingersoll-Rand Co.
International Paper Co.
Isuzu Motors America, Inc.

Jervis B. Webb Co.
Johnson Controls, Inc.
Joy Technologies Inc.

Kawasaki Motors Corporation, U.S.A.
KIA Motors of America, Inc.
Kraft General Foods

Lake Aircraft, Inc.

Matushita Electric Corp. of America
Mazda (North America), Inc.
Melroe Co.
Mercedes-Benz of N. America Inc.
Merck & Company, Inc.
Michelin Tire Corp.
Miller Brewing Co.
Minnesota Mining and Manufacturing Co.
Mitsubishi Motor Sales of America, Inc.
Monsanto Co.

Navistar International Transportation Corp.
New United Motor Manufacturing, Inc.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Co.
PACCAR Inc.
PepsiCo
Pfizer Inc.
Philip Morris Companies, Inc.
Pirelli Armstrong Tire Co.
Playtex Products Inc.
Porsche Cars North America, Inc.
PPM Cranes, Inc.
Procter & Gamble Company
RJ Reynolds Tobacco Co.
Rockwell International Corp.
Schindler Elevator Corp.
Sears, Roebuck and Co.
Sherwood Division of Harsco Corp.
Snap-on Inc.
Sturm, Ruger and Co., Inc.
Subaru of America, Inc.
The Boeing Company
The Budd Co.
The Coleman Co., Inc.
The Dow Chemical Co.
The Gates Rubber Co.
The Raymond Corp.
The Toro Co.
TRW Inc.
Toyota Motor Sales, U.S.A., Inc.
U.S. Tobacco
Union Carbide Corporation
Unocal Corp.
Upjohn Co.
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Co.
Web Service Company, Inc.
Whirlpool Corp.
White Consolidated Industries, Inc.
Yamaha Motor Corp., U.S.A.

No. 94-286

Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

FREIGHTLINER CORPORATION,

Petitioner,

v.

BEN MYRICK AND EMILY MYRICK,

Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Petitioner,

v.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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I. STATEMENT OF INTEREST

The American Automobile Manufacturers Association (AAMA) is a non-profit national trade organization. Its member companies, Chrysler Corporation, Ford Motor Company and General Motors Corporation, are principally engaged in the production and sale of motor vehicles.

The Association of International Automobile Manufacturers, Inc. (AIAM) is a trade association organized as a non-profit District of Columbia corporation representing the U.S. subsidiaries of international automobile companies. AIAM's member companies[1] distribute passenger cars, multipurpose passenger vehicles and light trucks in the U.S.[2]

Amici have a vital interest in the effect this decision may have on their members' exercise of federal options granted to them by Federal Motor Vehicle Safety Standard 208.

II. SUMMARY OF ARGUMENT

The majority of a sharply divided Eleventh Circuit panel set out to follow this Court's decision in *Cipollone*,[3] but went astray. It read *Cipollone* to mean that whenever an Act contains an express preemption statement that does not address a particular conflict between state law and the Act or regulations promulgated under it, the Supremacy Clause is powerless to preempt state law that flatly conflicts with the Act or regulations, or even state law that makes it impossible to comply with the Act or regulations. That reading of *Cipollone*, however, is clearly wrong; it is at odds with settled

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[1] AIAM members include American Honda Motor Co., American Suzuki Motor Corporation, BMW of North America, Inc., Fiat Auto U.S.A., Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Land Rover North America, Inc., Mazda Motor America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Rolls-Royce Motor Cars, Inc., Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., Volkswagen of America, Inc., and Volvo North America Corporation.

[2] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. *See* Sup. Ct. R. 37.

[3] *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1993).

law that is as old as the Republic. For it ignores a century or more of Supreme Court precedent holding that conflicting state law falls by "direct operation of the Supremacy Clause," and that even where a savings clause shows Congress's intent ***not*** to preempt, state law that directly conflicts with federal law is implicitly preempted. *Cipollone* did not address that precedent, much less purport to overrule it.

In reading *Cipollone* to foreclose any inquiry into any conflict between state and federal law, the court of appeals created a rule that turns the Supremacy Clause on its head. For under that rule, courts may not even inquire into, let alone prevent, conflicts between state and federal law, no matter what the federal law, no matter what the state law, and no matter how clear or severe the conflict between them. The upshot is that state law prevails over federal law – the opposite of what the Supremacy Clause commands.

The mischief wrought by the rule was proved in *Myrick* itself. In *Myrick*, the issue was whether a state common-law claim concerning truck brake design conflicted with Federal Motor Vehicle Safety Standard ("FMVSS") 121, the federal brake standard promulgated under the National Traffic and Motor Vehicle Safety Act,[4] and was, therefore, preempted. The court of appeals held itself bound to allow the common law claim to go forward, regardless of whether it flatly conflicted with, and undermined, federal law. But *Myrick* did not stop there. It went on to hold that its *Cipollone*-inspired injunction against implied conflict preemption analysis "supersede[d]" its earlier finding of preemption in another case, *Taylor*,[5] involving a different FMVSS and different claims, not before the *Myrick* court.

That different FMVSS – FMVSS 208[6] – grants manufacturers express restraint system design options, including the option to install seat belts instead of airbag in cars. Those

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[4] 49 U.S.C. § 30101 *et seq.* (formerly codified at 15 U.S.C. § 1381 *et seq.*).

[5] *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

[6] 49 C.F.R. § 571.208.

different claims – so-called "no airbag" claims – seek to impose liability on a manufacturer for exercising one option granted by FMVSS 208 (like the seat belt option) instead of another (like the airbag option).[7] Over a decade, an essentially unanimous body of case law[8] found that that regulation

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[7] FMVSS 208 grants manufacturers a variety of choices among belt systems and airbags. Thus, not all claims that challenge the chosen option, and seek a different one, are "no airbag" claims. *See, e.g., Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994) (FMVSS 208 and Safety Act preempt a claim that would take away two-point belt option and require exercise of three-point belt option); *Dykema v. Volkwagenwerk*, ___ N.W.2d ___, Nos. 93-1341, 93-2579 (Wis. App. Nov. 8, 1994) (same). We refer to these claims as "no airbag" claims, however, for simplicity, because the case law so describes them, and because most of them seek to mandate the airbag option.

[8] *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 787 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Dykema v. Volkwagenwerk*, ___ N.W.2d ___, Nos. 93-1341, 93-2579 (Wis. Ct. App. Nov. 8, 1994); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993), *rev. denied* 510 N.W.2d 137 (1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Nissan Motor Corp. v. Superior Court (Meier)*, 212 Cal. App. 3d 980 (Cal. Ct. App. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Gardner v. Honda Motor Co.*, 536 N.Y.S. 2d 303 (N.Y. App. Div. 1988), *motion for reargument denied* (Mar. 10, 1989); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Montag v. Honda Motor Co., Ltd.*, 856 F. Supp. 574 (D. Colo., 1994); *Tammen v. General Motors Corp.*, 857 F. Supp. 788 (D. Kan. 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Dallas v. General Motors Corp.*, 725 F. Supp. 902 (W.D. Tex. 1989); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Cerniak v. Nissan Motor Corp.*, 1991 WL 147366 (N.D. Ill. 1991); *Pak v. Chrysler Motors Corp.*, 1990 WL 198821 (E.D. Pa. 1990), *aff'd*, 941 F.2d 1200 (3d Cir. 1991); *Bass v. General Motors Corp.*, 1987 WL 54449 (W.D. Tex. 1987); *Vasquez v. General Motors Corp.*, 1986 WL 18670-71 (D. Ariz. 1986).

preempted those claims, for good reason: A state common-law claim that imposes damages on a manufacturer for exercising one federally-granted option instead of another would in effect take the option away, would risk killing or severely retarding the development of restraint systems, and so would flatly conflict with federal law, frustrate its purpose, and disserve the safety purposes of the Act. The Supremacy Clause forbids that.

Although it did not concern FMVSS 208 or "no airbag" claims, *Myrick* nonetheless unsettled that settled "no airbag" law. Post-*Myrick*, several courts have declined to find preemption of "no airbag" claims. Those courts did not dispute the direct conflict between FMVSS 208 and "no airbag" claims; rather, based on *Myrick*, they found conflict preemption is foreclosed in spite of the direct conflict.[9]

Amici – associations representing the automobile manufacturing industry – urge the Court to reverse the court of appeals' decision, and respectfully caution the Court, whatever the disposition of this case or the FMVSS 121 brake claims that are ultimately the subject of it, not to inadvertently decide the "no airbag" preemption issue. Whether a given claim based upon a state law conflicts with and frustrates a federal law necessarily turns on the claim, the state law, and the federal law. Thus the preemptive effect of other FMVSSs on other kinds of claims should not, and necessarily cannot, determine the effect of FMVSS 208 on "no airbag" claims. Indeed, the airbag issue underscores the vice of *Myrick*; it prevents even asking the questions about conflict between state and federal law that the Supremacy Clause answers.

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[9] Indeed, one court first found a direct conflict and preemption, and then reversed its preemption finding based on *Myrick*. *See Loulos v. Dick Smith Ford*, 1994 WL 66238 (Mo. Ct. App. March 8, 1993), superseded by 882 S.W.2d 149 (Mo. Ct. App. May 30, 1994). *See also Phillip v. Hyundai Motor Co.*, 639 So. 2d 1064 (Fla. Ct. App. July 12, 1994) (no preemption based on *Myrick*) (cert. petition pending); *Hernandez-Gomez v. Leonardo*, 1994 WL 593202 (Ariz. Nov. 1, 1994) (no preemption based on *Myrick*).

All three branches of government have asked the questions with respect to "no airbag" claims, and agree on the answer the Supremacy Clause compels: FMVSS 208 preempts them. Over 120 courts, including every circuit to address the issue, held with unprecedented unanimity (before *Myrick*) that FMVSS 208 is, in the language of the case law, "unique," and preempts even though other FMVSSs may not. As for the executive branch, at this Court's invitation, the Solicitor General, joined by counsel for the Department of Transportation and NHTSA,[10] advised the Court that allowing common-law claims that in effect take away FMVSS 208 options would "obviously eliminate the diversity that the secretary found necessary," would "*disserve* the *safety* purposes of the Act," and so would "stand as an obstacle" to the agency's objectives, in fact "drastically" interfere with them. Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (S. Ct., filed March 1990), at 14, 15 (original emphasis). Congress, for its part, has stated its intent not to "alter, change or modify in any way" the case law finding "no airbag" claims preempted. Pp. 21-28, below.

FMVSS 208 preemption is critical to the automotive industry. Claims that take away federally-granted FMVSS 208 options, if allowed, would turn every car accident on the road into a potential tort case, and a jury-by-jury referendum on the federal safety policy embodied in FMVSS 208. Every car is equipped with a restraint system authorized under FMVSS 208. Every person injured in every accident could claim that a different FMVSS 208 option should have been chosen in her car, and seek to punish the manufacturer for choosing an option federal law found essential to meeting the safety goal. Limitless ad-hoc second-guessing of FMVSS 208 would destroy the options that the Department of Transportation judged the best means to achieve that goal. That destruction of federal goals should not be permitted, especially as an unintended consequence of the Court's disposition of *Myrick*.

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[10] National Highway Traffic Safety Administration.

III. ARGUMENT

We chronicle the regulatory history of FMVSS 208 and set forth the preemption law applicable to it to demonstrate three propositions: (1) *Myrick*'s prohibition of implied conflict preemption analysis makes no sense when state law flatly conflicts with federal law; (2) whether state and federal law conflict in any case turns on the particular state law, federal law, and the effect of one on the other; and (3) "no airbag" claims flatly conflict with federal law, and they are therefore preempted. *Myrick*'s disposition ought not to affect that truth.

A. The Unique History Of Federal Regulation Of Restraint Systems

1. The Safety Act

In 1966 Congress determined that, given the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," the country needed motor vehicle safety standards that were "strong and adequately enforced," and "*uniform* throughout the country." S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added); *see* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). Therefore it concluded that "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 1301 in 1966 U.S.C.C.A.N. at 2712; *Wood*, 865 F.2d at 397-98.

Accordingly, Congress enacted the Safety Act. The Act directs the Department of Transportation and its subdivision, NHTSA, to issue federal motor vehicle safety standards that are "practicable," "meet the need for motor vehicle safety," and apply throughout the country. 49 U.S.C. § 30111 (formerly codified at 15 U.S.C. § 1392(a)). The "task called for considerable expertise." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983).

When the Department establishes a federal standard, the Safety Act expressly preempts state safety "standards" as to "the same aspect of performance" that are not "identical to

the [federal] standard." 49 U.S.C. § 30103(b) (formerly codified at 15 U.S.C. § 1392(d)).[11] The Act also states, in a section denominated "common law liability," that compliance with a federal standard "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e) (formerly codified at 15 U.S.C. 1397(k)). However, that provision is not denominated a preemption clause; structurally is not part of the preemption clause; and on its face says nothing about preemption, much less purports to preclude preemption of claims based on a non-identical common-law standard that directly conflicts with a federal standard. *See* pp. 18-20, below.

2. The Rich History Of FMVSS 208

FMVSS 208 is the occupant restraint standard. Options and flexibility are the heart of FMVSS 208, and have been for at least twenty years.

The Department first adopted FMVSS 208 in 1967. It required installation of manual lap belts in all new cars. 32 Fed. Reg. 2409, 2415 (1967). FMVSS 208 has had a rich and special history since then.

a. 1972-1975: Congress Prohibits Any Standard Mandating Airbags Unless Submitted To And Not Disapproved By It.

i. The Ignition Interlock And § 1410b.

"[T]he safety benefits of wearing seatbelts are not in doubt. . . . " *State Farm*, 463 U.S. at 52. However, manual seat belts are "active restraints," because the occupant must

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[11] The Safety Act recently was recodified so all "laws related to transportation [appear] in one comprehensive title," and moved from Title 15 to Title 49 of the United States Code. H.R. Rep. No. 108, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820. In the course of the recodification, there were some "technical improvements" to language to promote "clarity" and "consistency," and avoid "surplusage"; "precautions [were] taken against making substantive changes in the law." *See id*; 49 U.S.C.A. § 30103, Historical and Statutory Notes. The preemption case law discusses the provisions as codified before: To avoid confusion, this brief does also.

act to use them, and after the original FMVSS 208 issued, many people did not use them. Therefore, in 1972 the Department amended FMVSS 208 prospectively to require installation of airbags or automatic belts in cars built after August 15, 1975. The Department also required "vehicles built between August 1973 and August 1975 . . . to carry either passive restraints or [manual] lap and shoulder belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected." *State Farm*, 463 U.S. at 35.

There was a public outcry against ignition interlocks, and in 1974 Congress enacted 15 U.S.C. § 1410. It outlawed the "ignition interlock" standard, mandated that manufacturers retain the option to install manual seat belts, and prohibited a standard requiring airbags or any other nonbelt restraint system unless, among other things, such a standard had been submitted first to both houses of Congress and not disapproved by them. 15 U.S.C. §§ 1410b(b), 1410b(c). Congress authorized a standard permitting manufacturers to install nonbelt restraint systems, but only if the standard also permitted the manufacturers to install manual belt systems instead. 15 U.S.C. § 1410b(b)(3)(A).[12]

Congress' purpose, and § 1410b's effect, are clear: (1) Nothing more than seat belts and a warning signal were required because more was "not justified." 120 Cong. Rec. 27816, 27822 (1974) (remarks of Representative Wyman, author of amendment that became § 1410b). (2) The Secretary was therefore to permit manufacturers the option to install manual seat belts. (3) The Secretary "could permit a manufacturer (at his option) to comply with a standard with a nonbelt system instead of a belt system." H.R. Conf. Rep. No. 1452, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6084,

[12] A "belt system" under the Act is a manual belt system. *See* H.R. Conf. Rep. No. 1452 at 6108; 120 Cong. Rec. 27816, 27882 (1974).

6108. But (4) the Secretary could not take away the manufacturer's option to install manual seat belts without Congress' assent.[13]

ii. The Options.

Accordingly, on October 31, 1974, the Secretary amended FMVSS 208 to delete the ignition interlock requirements. 39 Fed. Reg. 38380 (1974). As amended, FMVSS 208 granted manufacturers three options: (1) passive restraints for front and lateral crashes; (2) passive restraints for front crashes plus lap belts for side crashes and rollovers; or (3) manual seat belts. Those were the same three options FMVSS 208 provided before the ignition interlock episode. Thereafter, FMVSS 208 granted those same "three options," 41 Fed. Reg. 36494 (1976), and rejected a mandatory passive restraint rule, in every model year from 1976-1987.

b. 1976-1984: Transportation Secretaries Reject Mandatory Airbags.

i. 1976: Secretary Coleman.

Secretary Coleman undertook a comprehensive study of passive restraints. He determined not to mandate them, and instead reaffirmed the manufacturers' "option" to install manual belts. 41 Fed. Reg. 24070, 36494 (1976); 42 Fed. Reg. 5071 (1977). The reasons were these:

Public Acceptance. A policy "unacceptable" to the public would be contrary to the "goal of motor vehicle safety," and "[e]very sampling of public opinion" showed most Americans did not want mandatory passive restraints. The Secretary's Decision Concerning Vehicle Occupant Crash Protection, D.O.T., Dec. 6, 1976 at 6, 11, 32, 52-57 ("Secretary's Decision").

Development of Technology and Data. It was important to "foster[ ] the continued development of passive restraint

[13] Even if the legislative veto aspect of § 1410b fails (*see I.N.S. v. Chadha*, 462 U.S. 919 (1983)), Congress' intent in § 1410b to preserve options is clear.

technology" and obtain more data before mandating them or any one of them. Secretary's Decision at 9, 12, 27, 34, 57.[14]

Increased Manual Belt Use. Education might increase manual belt use and so make passive restraints unnecessary; airbags provided no greater protection than seat belts, when used. *Id.* at 7, 13, 29, 33.

Disastrous Economic Consequences. Mandating passive restraints would, if the public rejected them, cause "disastrous economic consequences for the entire nation." *Id.* at 6, 7, 11.

Secretary Coleman concluded that the "overall goal of motor vehicle safety would not be served" by mandating airbags or any passive restraints "at this time." *Id.* at 30-32, 34, 36; *see also* 41 Fed. Reg. at 24070-71.[15]

ii. 1977-83: Secretaries Adams And Lewis.

Secretary Adams rejected an airbag-only standard again in 1977. He issued a prospective FMVSS 208 requiring some form of passive restraints to be phased into cars beginning in model year 1982. "The two principal systems that would satisfy the Standard were airbags and passive belts; the choice of which system to install was left to the manufacturers." *State Farm*, 463 U.S. at 379.

Secretary Adams was clear, however, that "a lead time of four full years should precede the [phase-in] requirement," (42 Fed. Reg. 34288, 34295 (1977)), and that the option to choose manual belts ought to stay in place, for all cars until the phase-in began, and for some until the phase-in was completed, for the same reasons Secretary Coleman cited: public acceptance, development of technology, and the need for additional data. *See, e.g.*, 42 Fed. Reg. at 34290-96, 61468; 46 Fed. Reg. 53420 (1981). *See also Pacific Legal*

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[14] The Secretary was particularly concerned about the "feasibility of manufacturing millions" of reliable passive restraints. 41 Fed. Reg. at 24072.

[15] Secretary Coleman planned a demonstration project to help answer the consumer acceptance question. Secretary's Decision at 6-9, 30-33. The program was canceled by his successor. *See State Farm*, 463 U.S. at 37.

Found. v. Department of Transp., 593 F.2d 1338, 1348 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).[16]

In 1981, Secretary Lewis delayed the phase-in for one year by reason of the "economic situation," poor "consumer acceptance," and the need for more development time, particularly as to smaller cars (which, because of gas shortages, made up 90% of the new fleet). 46 Fed. Reg. 12034, 21174-75 (1981). In 1982, he rescinded the requirement altogether, and concluded that manufacturers should "continue to have the current option" to provide seat belts. 46 Fed. Reg. 53419-25 (1981).

This Court reviewed that rescission decision and, in 1983, remanded it. *State Farm*, above.

c. 1984-Now: The Rule In Force Today

On remand, Secretary Dole undertook a comprehensive review of all restraint systems, 49 Fed. Reg. 28962-63, 28984-86, 28991, 28996 (1984), and reached the "final rule" that applies (with some minor modifications) today. *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 478 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) (upholding final rule). The rule called for careful implementation of passive restraint standards over time. Thus it required some kind of passive restraint (no one kind was required) in 10% of cars built in the 1987 model year, 25% of cars built in the 1988 model year, 40% of cars built in the 1989 model year, and

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[16] Secretary Adams' prospective mandatory passive restraint regulation was submitted to Congress and not disapproved by it. But Congress provided in the Department of Transportation's annual appropriation legislation for 1979 and 1980 that "[n]one of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." Dept. of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 96-131, § 317, 92 Stat. 435, 450 (1978); Dept. of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 95-335, § 317, 93 Stat. 1023, 1039 (1979). "Belt System" meant the "active restraint system, which is the lap-shoulder belt system that we have on cars today." 125 Cong. Rec. at 36924-25 (1979).

100% of the cars built in the 1990 model year.[17] 49 Fed. Reg. at 28999-29000. That gradual phase-in was vital to promote a variety of different systems and to "encourage the development of [restraint] technologies." 49 Fed. Reg. at 28987, 28997, 29000.

Secretary Dole determined not to mandate any particular form of passive restraint at any time. She reasoned that each passive restraint system had different virtues, 49 Fed. Reg. at 29001, and found that "public acceptability" of mandatory passive restraints would be enhanced by authorizing manufacturers to install different restraint systems, so the public could choose among them. *Id.* at 28997, 29001. The Secretary found a "number of reasons" not to mandate airbags in particular, *id.* at 29000, including these: (1) "An airbag alone is less effective" than three-point belts when used, 49 Fed. Reg. at 28986; (2) airbags are costly, especially to replace, *id.* at 29001; (3) airbags may not protect out-of-place occupants and, in fact, might cause injuries, especially to children, *id.* at 28992, 29001; and (4) the public feared airbags and might not accept them. *Id.* at 29001.

Secretary Dole concluded that state enactment of MULs (n.___, above) was a better way to achieve the safety goal than mandating any form of passive restraint. She reasoned that seat belts, when used, are more effective than airbags alone, and greater use of seat belts is "the quickest, least expensive way by far to significantly reduce fatalities and

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[17] Even when that standard was adopted, passive restraints were the second choice. The Department found that greater manual seat belt use was the "quickest and least expensive way by far to significantly reduce fatalities and injuries," 49 Fed. Reg. at 28997, and determined to require the phase-in of passive restraints in 1987 only if states with two-thirds of the population had not enacted mandatory use laws ("MULs") by then. As the Government explained at the time, MULs "provide immediate and significant safety" that "no passive restraint requirement can possibly achieve," so "if sufficient MULs are enacted," mandating passive restraints "would not be appropriate." Government's Brief, *State Farm v. Dole*, Nos. 84-1301, 84-1459, and 84-1462, 802 F.2d at 474 (D.C.Cir.), at 18, 34-39. The Secretary further provided that any phase-in of passive restraints was to cease after it began if a sufficient number of states enacted MULs between 1987 and 1989; sufficient states did not enact them.

injuries. "*Id.* at 28997." And even when passive restraints were to be phased in, Secretary Dole determined that mandating airbags or any other single type of passive restraint "*runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems.*" *Id.* at 29001 (emphasis added).

The need for flexibility was particularly great as to passenger-side restraints. Indeed, in March 1987, Secretary Dole determined that "various technical, engineering and supplier resource problems" still existed with regard to passenger side airbags. 52 Fed. Reg. 10096 (1987). In November 1987, the Secretary reaffirmed that federal safety policy purposely did not "require manufacturers to install airbags, or any other particular type of automatic restraint system." 52 Fed. Reg. 42440, 42441 (1987). The Secretary noted that passenger-side airbags that had been put on the road were "overly aggressive," and also pointed out that it was "emphatically not the case" that the technology for passenger-side airbags was reasonably advanced, 52 Fed. Reg. at 42441-43. *See also Public Citizen v. Steed*, 851 F. 2d 444, 446-48 (D.C. Cir. 1988) (opinion by Ginsburg, J.).

The passive restraint phase-in began in 1987, because a sufficient number of states had not enacted MULs. In this model year (1995), the standard requires passive restraints in all passenger cars, but continues to grant the manufacturer the option as to what type of passive restraint to install.[18]

In sum, from the beginning to the passive restraint phase-in, FMVSS 208 granted – and Congress mandated – the option to install manual seat belts or passive restraints. Still today, FMVSS 208 grants manufacturers the option as to what

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[18] In 1991, Congress amended the Safety Act to require airbags prospectively in all passenger cars. Congress granted the Secretary until September 1, 1993 to promulgate an amendment to FMVSS 208 requiring airbags in 95% of all cars built in the 1997 model year, and 100% of cars built in the 1998 model year. *See* Pub. L. No. 102-240, § 2508.

Congress also made clear that its judgment that airbags should be required in the regulations of the future was not to change the preemption case law as to the regulations of the past. Pp. 27-28, below.

passive restraint to install in cars, and does not mandate airbags or any other single passive system.

B. The Eleventh Circuit's Decision Guts The Supremacy Clause And Violates This Court's Pre-emption Decisions.

1. State Law That Directly Conflicts With Federal Law Is Preempted By Direct Operation Of The Supremacy Clause.

In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1993), this Court held that where an Act's preemption clause provides "a 'reliable indicium of congressional intent with respect to state authority,' " and where "other provisions" of the Act "offer no cause to look beyond" the preemption clause, there is no "need" to look beyond it. 112 S. Ct. at 2618. The *Myrick* majority misread that language to add a "new wrinkle to the fabric of pre-emption law," and a "clear instruction that when there is an express pre-emption provision we should not consider implied pre-emption," even in the face of a direct conflict between state and federal law, or even where a state-law rule makes compliance with federal law impossible. 13 F.3d at 1521-22.

In fact, the language from which the *Myrick* majority inferred that "new wrinkle" is not new at all. That language is at least 14 years old. *See e.g., California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) ("[T]here is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two [pre-emption] sections provide a 'reliable indicium of congressional intent with respect to state authority' to regulate employment practice") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)). It never before was imagined to preclude conflict preemption analysis, much less mandate that state law prevails and federal law falls (the opposite

of what the Supremacy Clause commands) when a state law directly conflicts with federal law.[19]

The Supremacy Clause provides that federal law is the "supreme law of the land." Therefore, a state law that conflicts with federal law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). Indeed, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962). That basic rule is as old as the Republic, and *Cipollone* certainly did not change it, much less by dint of a passing sentence that echoed settled law.

Indeed, the Court's own analysis – just before and then after *Cipollone* – confirms that the basic rule is still the law. Just a week before *Cipollone*, this Court found that a state law "in conflict" with federal law was impliedly preempted despite an express preemption clause, and, quoting *Free v.*

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[19] *Myrick* also cited, as support for its rule foreclosing conflict preemption, *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732 (1993). *CSX* considered whether the Federal Railroad Safety Act (FRSA) preempts state tort claims regarding a warning device at a railroad crossing. The FRSA has an express preemption clause that bars any state law requirement that relates to railroad safety when there is a federal "rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The Court stated that "[i]f the statute contains an express pre-emption clause, the task of statutory constriction must *in the first instance* focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 113 S. Ct. at 1737 (emphasis added). The Court looked at the federal regulations at issue, judged that they did not cover the same subject matter as the tort claims, and so held that those claims were not expressly preempted. 113 S. Ct. at 1742. The Court then "reject[ed] petitioner's claim of implied 'conflict' preemption, * * * on the basis of the preceding analysis." 113 S. Ct. at 1742 n.12.

The *Myrick* majority read that to mean a "separate implied pre-emption analysis" was precluded because the statute contains an express preemption clause. 13 F.3d at 1524. But we submit that Judge Hill, in dissent, read *CSX* correctly: the Court simply found that federal law did not "cover" the same subject as the state common law in issue, and accordingly "did not conduct an implied conflict pre-emption analysis because . . . it found no conflict" between state and federal law. *See* 13 F.3d at 1530 (Hill, J., dissenting).

Bland, reaffirmed that basic rule. *Gade v. National Solid Waste Management Ass'n*, 112 S. Ct. 2374, 2388 (1992).[20] Just last year, this Court "discern[ed] no solid basis for believing that Congress," when it included both a preemption clause and a savings clause in an Act, "intended fundamentally to alter traditional preemption analysis." *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993). Thus, it held that the saved state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs." *Id.* (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

In a long line of preemption decisions, this Court has considered – and, indeed, adopted – implied preemption arguments under statutes with express preemption clauses. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-42 (1990) (ERISA); *Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 509-22 (1989) (Natural Gas Act); *Jones v. Rath Packing Co.*, 430 U.S. 519, 538-43 (Fair Packing and Labeling Act), *reh'g denied*, 431 U.S. 925 (1977).[21] In fact, over a century of case law makes clear that, even where an act has a common-law savings clause and no preemption clause at all, the Supremacy Clause preempts state common law that directly conflicts with federal law. Thus in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Supreme Court held preempted a conflicting common-law claim in the face of a savings clause, because a savings clause "cannot in reason be construed as

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[20] *Gade* also observed that "our pre-emption categories are not 'rigidly distinct.' " 112 S. Ct. at 2386, n.2. *Myrick* comments that *Gade* was decided by a plurality. 13 F.3d at 1523. But 3 of the 4 members of that plurality (Chief Justice Rehnquist, and Justices White and O'Connor) were also members of the *Cipollone* plurality whose language *Myrick* relied on.

[21] As Justice Souter observed last Term, "whether or not Congress has used any special 'preemptive' language, state regulation must yield to the extent it actually conflicts with federal law." *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1776 (Souter, J., dissenting, joined by Blackmun, Stevens, and Ginsburg, JJ.), *reh'g denied*, 114 S. Ct. 2771 (1994).

continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94, 493 n.13 (1987) (savings clause provided "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law;" Senate Report said "[c]ompliance with . . . Act would not be a defense to a common law action for . . . damages;" conflicting common law claims preempted; Congress could not have "intended to undermine . . . [the Act] through a general savings clause"). *Accord Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210-11 (1986); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania v. Nelson*, 350 U.S. 497, 501 n.10 (1956), *reh'g denied*, 351 U.S. 934 (1956); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980). *See also Morales*, 112 S. Ct. at 2037 ("general 'remedies' savings clause cannot be allowed to supersede the specific substantive pre-emption provision"); *John Hancock*, 114 S. Ct. at 526 (saved state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs") (citing *Silkwood*, 464 U.S. at 248).

Myrick proposes that *Cipollone* changed all that law, without mentioning it, and with this startling consequence: (1) A state law that "interferes with and frustrates" federal law – in other words, flatly conflicts with it – is implicitly preempted absent any preemption clause in the federal statute the state law flatly conflicts with. But (2) that state law is not implicitly preempted if the federal statute the state law conflicts with contains a preemption clause and that clause does not expressly preempt the state law. So (3) a federal statute has greater preemptive force as to a conflicting state law if it does not have a preemption clause than if it does. In fact, (4) according to *Myrick*, "when there is an express pre-emption provision we should not consider implied pre-emption" at all,

even though a state law flatly conflicts with federal law, and indeed even when it is absolutely "impossible" to comply with federal law if one complies with the state law, and vice versa. 13 F.3d at 1519, 1522.

Cipollone did not hold that when Congress enacts a preemption clause, it gives the Act less preemptive force, not more, than the Act would have without the clause. And *Cipollone* did not overrule a century of authority, and the settled principles that authority lays down, without mentioning it.

2. The Safety Act Does Not Save Common-Law Claims That Directly Conflict With Federal Safety Standards.

The Eleventh Circuit majority in *Myrick* read the broad language of the preemption clause as if it were narrow, read the narrow language of § 1397(k) as if it were broad,[22] and

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[22] Thus, the circuit court treated the clause as a "savings" clause, even though it is not denominated a preemption clause; structurally is not part of the preemption clause; speaks only to compliance as a defense on the merits; has none of the traditional language in savings clauses; and says nothing on its face about preemption, much less purports to preclude preemption of claims based on a non-identical common-law standard that directly conflicts with a federal standard.

The circuit court then gave the so-called savings clause a broad reading, and reasoned that unless it saved all common-law claims, regardless of conflict with federal law, it would be " 'a mere redundancy.' " 13 F.3d at 1520 (citing *Taylor*, 875 F.2d at 823-825). That ignored the function traditionally ascribed to savings clauses: to show that Congress has not "occupied the field" of safety regulation, for savings clauses are meant "not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute." *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *accord Chicago & N.W. Transp. Co.*, 450 U.S. at 328 (savings clause included because without it, " 'it might have been claimed that, Congress having entered the field, the whole subject . . . had been withdrawn from the jurisdiction of the state courts' ") (quoting *Puritan*, 237 U.S. at 130). Indeed, if *Myrick* were right that the existence of a preemption clause forecloses preemption of anything not covered by the clause, the so-called savings clause would serve no purpose at all.

concluded that language in the two clauses that it had previously found "ambiguous" and "conflict[ing]" nonetheless provided such a "reliable indicium" of Congress' preemptive intent that they foreclosed any inquiry into whether state and federal law conflict. The majority's decision is wrong to start with because, properly read, the preemption clause expressly preempts common law claims.[23] But even if that were not so, the converse – that the preemption clause is a reliable indicium of Congress' intent not to preempt claims that flatly conflict with an FMVSS – is certainly wrong.

Even before *Cipollone*, all four circuits to address the question concluded that § 1397(k), treated as a savings clause, shows that the preemption clause, § 1392(d), is not a "reliable indicium" of Congress' preemptive intent – either way – on the matter at hand, and so "offers cause to look beyond" § 1392(d). As the First Circuit summed it up, the "Safety Act is thus ambiguous as to . . . whether a state product liability claim . . . which seeks to hold an automotive manufacturer liable for failing to adopt a standard 'not identical' to a federal safety standard covering the 'same aspect of performance' . . . is *preserved* by section [1397(k)] [or] preempted by § 1392(d)." 865 F.2d at 398 (emphasis in original). *Accord Taylor*, 875 F.2d at 825 (finding "conflict between the language of the Safety Act's preemption and savings clauses" and "conclud[ing] that the Safety Act cannot be construed as

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[23] The circuit court endorsed its pre-*Cipollone* holding that common law claims did not fall within the Safety Act's express preemption provision because Congress failed to " 'make explicit reference to state common law in the Act's preemption clause.' " 13 F.3d at 1520 (875 F.2d at 824). But that rationale was repudiated by *Cipollone*. 112 S. Ct. at 2619-21. Indeed, many courts, both before and after *Cipollone*, have found that the preemption clause expressly preempts common-law claims based on a standard that conflicts with an on-point FMVSS. *See Miranda*, 647 A.2d at 174; *Boyle*, 501 N.W.2d at 869; *Gills*, 829 F. Supp. at 898-99; *Montag*, 856 F. Supp. at 577; *Nissan v. Superior Court*, 212 Cal. App. 3d at 982; *Vanover*, 632 F.Supp. at 1096-97; *Cox*, 646 F.Supp. at 763; *Wickstrom*, 416 N.W.2d at 840; *Wattelet*, 676 F. Supp. at 1040.

Petitioners and other amici address express preemption at length, so we will not address it further here.

unambiguously manifesting an intention to preempt appellants' common law claims."); *Pokorny*, 902 F.2d at 1121; *Kitts*, 875 F.2d at 789 (following *Wood*); *Heath*, 756 F. Supp. at 1147 (the "savings clause, when considered in combination with the preemption clause, makes ambiguous Congress' intent with respect to preemption of state common law claims").

Even if the Safety Act's preemption clause does not expressly preempt conflicting claims, at a minimum *Cipollone* adds force to the clause, and so sharpens the conflict that the courts already had found between the preemption clause and the savings clause. Consequently, at a minimum *Cipollone* underlines the ambiguity of each, and accordingly, far from foreclosing implied preemption analysis, compels it. *See, e.g., Boyle*, 501 N.W.2d at 871 ("Because the explicit preemption clause and the savings clause appear to conflict, neither clause 'provides a reliable indicium of congressional intent with respect to state authority.' The existence of two clauses dealing with preemption that appear to conflict compels us to look beyond the express preemption provision.") (quoting *Cipollone*); *Marrs*, 852 S.W.2d at 575-76; *Gills*, 829 F. Supp. at 899.[24]

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[24] The implied preemption analysis is also compelled by the regulation itself, even apart from Congress' clashing messages in the Safety Act.. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings*, 458 U.S. at 154. The proper inquiry is "whether the federal agency has properly exercised its own delegated authority." *City of New York v. Federal Communications Commission*, 486 U.S. 57, 64 (1988). Thus, "[s]o long as an agency has statutory authority to issue regulations, those regulations will preempt inconsistent state [law] by the simple operation of the Supremacy Clause." *Lincoln Sav. and Loan Ass'n v. Federal Home Bank Bd.*, 856 F.2d 1558, 1560 (D.C. Cir. 1988). Here, NHTSA acted under a broad delegation of congressional power. See 15 U.S.C. §§ 1381, 1392(a), 1407. NHTSA acted within its authority in granting FMVSS 208's options. *Public Citizen*, 851 F.2d at 450; *State Farm Mutual Ins. Co. v. Dole*, 802 F.2d 474 (D.C. Cir. 1986), *cert. denied*, *New York v. Dole*, 480 U.S. 951 (1987). That federal option-based regulation preempts state law claims that would take any of the options away. Pp. 23-24, below.

In sum, after *Cipollone*, there are two alternatives: Either: (1) the Safety Act's preemption clause expressly preempts common law claims that conflict with an on-point FMVSS, an argument that *Cipollone* makes even more forceful; or (2) the preemption clause, taken with the savings clause, is not a "reliable indicium" of Congress' intent, so there is "cause to look beyond" it to implied preemption. But again: regardless whether a statute contains a preemption clause, a state law that flatly conflicts with the statute or regulations promulgated under it is preempted by direct operation of the Supremacy Clause.

C. All Three Branches Of Government Have Found That "No Airbag" Claims Are Preempted.

The issue in any conflict preemption case is whether Congress intended to preempt a state law that, as applied in the case at hand, flatly conflicts with the federal statute – or regulation under the statute – that contains the clause. The inquiry is necessarily case specific, for whether a given claim based upon a state law conflicts with federal law turns on the claim, the state law, and the federal law. Indeed, that is the vice of *Myrick*; it prevents courts from even considering the particular conflict at issue in any case where the federal law contains a preemption clause, no matter how strong the conflict in that case between the state and federal law, and however the state law frustrates the federal law's purpose or the methods chosen to meet its purpose.

FMVSS 208 and the "no airbag" claims that undermine it present the paradigm conflict preemption case, and illustrate the folly of *Myrick*'s preclusion of implied conflict preemption analysis – whatever the case. FMVSS 208 is a "unique" regulation, and "no airbag" claims are unique in Safety Act litigation. *See, e.g., Gills*, 829 F. Supp. at 897 (referring to FMVSS 208's "unique characteristics"); *Welsh v. Century Products, Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990) ("FMVSS 208 is an unusual regulation"). To start with, the Safety Act, § 1410(b), mandates that NHTSA grant manufacturers restraint system options; no other provision of the

Safety Act mandates options. FMVSS 208, in turn, expressly grants manufacturers a choice among restraint system options and its regulatory history recites that the options are an essential means to achieve the federal safety goal; other FMVSSs do not expressly grant such specific options, or share FMVSS 208's rich regulatory history regarding the need for and purpose of them. *See* pp. 7-14, above.

Moreover, most Safety Act standards are performance, not design, standards. The "usual common law action for design defect," however, "creates a design standard rather than a performance standard." Therefore, a "direct conflict between a common law design standard and a Safety Act performance standard" is a "rare event indeed." *Wood*, 865 F.2d at 402 n.9, 416.

"No airbag" claims present that "rare event" for at least three reasons. First, "no airbag" claims, if allowed, would take away the options FMVSS 208 grants. Pp. 23-24, below. Second, FMVSS 208 sets forth detailed design requirements with respect to restraint systems; accordingly, FMVSS 208, in contrast to most other FMVSSs, "has elements of a design standard." 865 F.2d at 417. Third, "no airbag" claims "potentially affect[ ] every vehicle on the road." 865 F.2d at 418. For every car has a restraint system, and every restraint system is a potential target when someone is injured in a car accident. If people can second-guess the federal restraint system option chosen for every car, every accident becomes a potential "no airbag" case. Accordingly every case becomes an invitation to jury arrogation of the power to review, and transform, federal rulemaking.

Consequently, "no airbag" claims would "establish what is in practical effect a new safety standard" creating a "direct conflict" with the federal standard. *Wood*, 865 F.2d at 402, 406, 418. Not surprisingly, then, all three branches of the United Sates government have concurred that, whatever the effect of other regulations, FMVSS 208 preempts claims that would take away the options it grants.

1. The Courts Have Overwhelmingly Held That FMVSS 208 Preempts "No Airbag" Claims.

An overwhelming body of case law – essentially unanimous until *Myrick* – found "no airbag" claims preempted. Some reached that conclusion by the express preemption route, most by the implied preemption route. Both are sound.

We address the implied preemption authority here. "No airbag" claims conflict with the purposes and methods of Congress and the Department of Transportation, and so are subject to implied preemption, in at least two ways.

a. Ground 1: A State Rule Imposing Damages For Choosing To Install One FMVSS 208 Authorized Restraint System Instead Of Another Punishes The Exercise Of A Federal Option.

FMVSS 208 gives manufacturers the right to choose any of the restraint systems sanctioned by it. FMVSS 208 permits that flexibility and grants those options because Congress, by § 1410(b), and the Department of Transportation judged that it should. Pp. 7-9, above. *See Pokorny*, 902 F.2d at 1123-24 ("Section 1410b shows, *inter alia*, that Congress intended manual seat belts to remain one of the options"). The Department balanced costs and benefits, and determined that permitting manufacturers to choose among options rather than mandating one would "provide sufficient latitude for industry to develop the most effective [restraint] systems." 49 Fed. Reg. at 28997, 29001, *quoted in Baird*, 654 F. Supp. at 32. The Department determined the converse was also true: "Restricting the manufacturers" to a single choice, like airbags, risks "killing or seriously retarding development of more effective, efficient occupant protection systems." 49 Fed. Reg. at 28962, 28997, 29001; pp. 11-13, above. "Thus, the intent of the regulatory scheme is to provide flexibility in the development of technologies to improve automotive safety." *Baird*, 654 F. Supp. at 32.

"No airbag" claims, if allowed, would permit a jury to impose damages on a manufacturer because it chose the seat

belt option, instead of the airbag option. A state common-law standard imposing damages on a manufacturer for choosing a federally-granted option in effect takes away that option and, with it, the manufacturer's flexibility. That standard also punishes a manufacturer, after the fact, for doing what FMVSS 208 authorized the manufacturer to do. Consequently, that standard would defeat Congress', and the Department's, full and most basic objectives.

Therefore, "no airbag" claims are preempted. As this Court made clear in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982), a "state common law rule cannot take away the flexibility provided by a federal regulation," "cannot prohibit the exercise of a federally granted option," and cannot impose damages for doing "what a federal act or regulation 'authorized [one] to do.' " *Taylor*, 875 F.2d at 827. *Accord Pokorny*, 902 F.2d at 1125; *Wickstrom*, 416 N.W.2d at 841; *Baird*, 654 F. Supp. at 32; *Cox*, 646 F. Supp. at 763-64; *Dallas*, 725 F. Supp. at 906. In sum, "a state common law rule that would, in effect, remove the element of choice authorized in [FMVSS 208] would frustrate the federal regulatory scheme," and so is "impliedly preempted." *Taylor*, 875 F.2d at 827. *See Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 783 (3d Cir. 1992) ("an action asserting liability for choosing one of the three passive restraint options section 1410b and Standard 208 named instead of another would frustrate the regulatory framework and undermine the flexibility that Congress and the Department of Transportation intended to give to manufacturers in deciding whether to include air bags, automatic or manual seat belts in their design").

b. Ground 2: Permitting States To Limit The Exercise Of A FMVSS 208 Option Would Destroy The Uniformity The Act Is Meant To Achieve.

Congress intended uniform federal motor vehicle safety standards that apply everywhere. *Wood*, 865 F.2d at 412; *Kitts*, 875 F.2d at 789 (quoting *Wood*). Indeed, that is why

§ 1392(d) is in the Safety Act. *Wood*, 865 F.2d at 412. P. 6, above.

FMVSS 208 grants manufacturers the option to choose among restraint systems, specifically including the option to install seat belts, and not airbags. That standard applies nationwide. A state regulation requiring the installation of a system with airbags instead of manual or automatic seat belts would not be "identical" to that nationwide standard, and instead would conflict with it. That state regulation would therefore effect nonuniformity. Accordingly, § 1392(d) would preempt it. *Wood*, 865 F.2d at 408-09.

"No airbag" claims would have the same effect as the forbidden regulation. As *Cipollone* holds, " '[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' " 112 S. Ct. at 2620 (quoting *Garmon*, 359 U.S. at 247). A claim based on a rule requiring airbags would be "tantamount to establishing" a "conflicting" state regulation requiring airbags, and have essentially the same "effect." *Wood*, 865 F.2d at 401-02, 410-11, 418 (citing *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987)).

Therefore that claim "would destroy the uniformity of the federal standard, and exceed the Safety Act's prescribed role for state regulation." *Wood*, 865 F.2d at 412; *Kitts*, 875 F.2d at 789; *see also Staggs*, 678 F. Supp. at 272; *Nissan Motor Corp.*, 212 Cal. App. 3d at 982; *Wickstrom*, 416 N.W.2d at 841; *Hughes*, 677 F. Supp. at 77-78. Indeed, Congress' purpose to ensure uniform national standards "would be entirely frustrated by" that claim. *Cox*, 646 F. Supp. at 763-64. Accordingly, it is preempted. *See also Ouellette*, 479 U.S. at 496-97 (finding implied preemption because permitting common-law suits along interstate waterways would subject water discharger to a "variety of common-law rules" and so "undermine" Congress' purpose to ensure " 'clear and identifiable' " standards); *Chicago & N.W. Transp. Co.*, 450 U.S. at 326 ("A system under which each State could, through its courts, impose . . . its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress").

Logic compels that result, and so does real life. If a jury in one state could require airbags, and so impose a different standard from FMVSS 208, so could juries in other states. The upshot would be a patchwork of different restraint standards in different states – airbags here, manual belts there, automatic belts somewhere else – as juries saw fit, on the basis of whatever was before them from time to time. Indeed, a car lawful in one state would become unlawful when driven to another. *See Hughes*, 677 F. Supp. at 77-78 ("the vagaries of jury standards of safety could result in a different result in each suit brought"). That "type of ad hoc regulation is exactly what Congress sought to exclude. . . . " *Vanover*, 632 F. Supp. at 1096. *Accord, Wood*, 865 F.2d at 413; *Kitts*, 875 F.2d at 789; *Wickstrom*, 416 N.W.2d at 841; *Staggs*, 678 F. Supp. at 272; *Hughes*, 677 F. Supp. at 77-78; *Cox*, 646 F. Supp. at 763-64.

2. The United States Has Stated Its View That FMVSS 208 Preempts "No Airbag" Claims.

In 1990, the Solicitor General, joined by counsel for NHTSA and the Department of Transportation, filed a brief in this Court opposing certiorari in several federal circuit court cases finding FMVSS 208 preemption. The brief explained that diversity was a "critical feature" of Secretary Dole's version of FMVSS 208, and that it reflected "the Secretary's policy judgment that safety will best be promoted if manufacturers install *alternative* protection systems in their fleets, rather than one particular system in every vehicle." Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (U.S. Sup. Ct., filed March 1990), at 13.

The brief concluded that claims imposing damages for a manufacturer's failure to install one passive restraint system, instead of another, would "obviously eliminate the diversity that the Secretary found necessary," would therefore "*disserve* the *safety* purposes of the Act," and so would "stand[ ] as an obstacle" to the agency's objectives, in fact "drastically" interfere with them. *Id.* at 14, 15 (original emphasis).

> [A] critical feature of FMVSS 208 is the Secretary's policy judgment that safety will best be promoted if manufacturers install *alternative* protection systems in their fleets, rather than one particular system in every vehicle.
>
> . . . If manufacturers are held liable for not installing airbags, the burden of paying sizable compensatory and punitive damages awards along with "[t]he centralized, mass-production, high volume character of the motor vehicle manufacturing industry in the United States," [citation omitted] is likely to lead auto makers to install airbags in all cars. That outcome would obviously eliminate the diversity that the Secretary found necessary to promote motor vehicle safety. At the least, holding a manufacturer is liable for not installing airbags would drastically "interfere[ ] with the methods by which [FMVSS 208] was designed to reach [its] goal." [citation omitted] Under these circumstances, design defect tort actions would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the agency]," [citation omitted] and thus would be preempted by federal law. . . . It is that policy of affirmatively encouraging diversity that would be disrupted by tort liability, which therefore would be preempted.

Id. at 13-15 (original emphasis). Thus, the Solicitor General, NHTSA and the Department of Transportation concluded, "no airbag" claims are "impliedly preempt[ed]." *Id.* at 7.

3. Congress Expressly Stated Its Intent Not To Change The Preemption Case Law Under FMVSS 208.

At NHTSA's request, and again unique in Safety Act litigation, Congress has expressed its intent not to change the case law preempting "no airbag" claims.

Congress amended the Safety Act in 1991 to require airbags, beginning in 1997. *See* Pub. L. No. 102-240, § 2508. The House Conference Report recites that NHTSA alerted Congress that "most courts that have considered the matter have ruled that ["no airbag" claims] are preempted by the [Safety Act] and/or the safety standards issued by NHTSA." Nov. 7 Letter from NHTSA, cited in H.R. Rep. No. 404, 102nd Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783. NHTSA also cautioned Congress that the amendments could call these preemption rulings into question, and that if Congress adopted a mandatory-airbag rule, it was "possible that some courts would conclude that these claims are no longer preempted." *Id.*

Congress responded by specifying that the 1991 amendment requiring airbags prospectively

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Pub. L. No. 102-240, § 2508(d).

Thus, having been specifically apprised of the overwhelming authority finding claims like plaintiff's preempted, Congress expressly did "not want by this section to change" those cases. H.R. Rep. No. 404 at 403. Congress' express acceptance of the case law interpreting the preemptive reach of FMVSS 208 confirms that its legislative intent was properly gauged by that case law. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911).

* * * *

In sum, whether a given claim conflicts with a given regulation, and so is preempted, turns on the regulation and the claim. Thus, for example, the courts have held that FMVSS 108 does not preempt some claims about illumination devices that do not conflict with an FMVSS 108 performance standard, whereas FMVSS 208 does preempt "no airbag" claims. *Compare, e.g., Pokorny*, 902 F.2d at 1125 (3rd Cir. 1990) (Third Circuit finds FMVSS 208 preempts), *with Buzzard*, 966 F.2d at 783 (same court finds FMVSS 108 simple performance standard does not preempt); *compare Kolbeck*, 702 F. Supp. 532 (Pennsylvania district court finds FMVSS 208 preempts), *with Swope v. SIT Transit Corp.*, 796 F. Supp. 160, 164 (E.D. Pa. 1992) (same court finds FMVSS 108 simple performance standard does not preempt because, unlike FMVSS 208, it "does not contemplate a flexible scheme that would be undermined by an imposition of common law liability"). *See also Cox*, 646 F. Supp. 761 (FMVSS 208 preempts), *and Welsh*, 745 F. Supp. at 321 (same court finds FMVSS 213 does not preempt claims concerning child safety seat design because, unlike FMVSS 208, FMVSS 213 "does not permit a manufacturer to choose among options").

Myrick's vice is that it reads *Cipollone* to preclude conflict preemption analysis whatever the federal law, and whatever the claim. The upshot is that *Myrick* would wipe out the overwhelming body of authority finding that FMVSS 208 preempts "no airbag" claims, without considering the law and claims that gave rise to the preemption conclusion. We submit that is a misreading of *Cipollone* and this Court's teachings over a century, and is the opposite of what the Supremacy Clause commands.

CONCLUSION

AAMA and AIAM respectfully submit that the Court should reverse the Eleventh Circuit's decision, and reaffirm that federal law prevails whenever state law directly conflicts with it. If the Court reaches the apparent conflict between FMVSS 121 and the plaintiff's claim in *Myrick*, however the Court rules as to it, we ask the Court to be mindful of the overwhelming authority finding "no airbag" claims pre-empted, and not to disturb it.

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November 15, 1994.

No. 94-286

FILED
DEC 13 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
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v.
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NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
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JACK LINDSEY, EXECUTOR OF THE ESTATE AND SURVIVING SPOUSE OF GRACE C. LINDSEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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36 pp

QUESTION PRESENTED

Whether, under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 *et seq.*, Federal Motor Vehicle Safety Standard 121, 49 C.F.R. § 571.121, preempts respondents' negligent design claims.

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case involves an issue at the core of *amici*'s interests: whether the National Traffic and Motor Vehicle Safety Act (Safety Act), 15 U.S.C. §§ 1381 *et seq.*, preempts state tort claims premised on a manufacturer's negligence in designing a motor vehicle and its equipment.

The States, through the mechanism of tort liability, have long protected their citizens by requiring that manufacturers compensate those injured by negligently and defectively designed products. *See, e.g., MacPherson v. Buick Motor Co.,* 111 N.E. 1050 (N.Y. 1916). In the context of negligently designed motor vehicles, state tort liability also promotes the public safety by encouraging manufacturers to design their products in light of available safety technology. In keeping with the Safety Act's purpose of reducing the toll of motor vehicle accidents, deaths and injuries, *see* 15 U.S.C. § 1381, Congress expressly preserved state tort liability even when a claim is premised on a negligent design which otherwise complies with an applicable Federal standard. *See* 15 U.S.C. § 1397(k).

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt respondents' statement.

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[1] The parties have consented to the filing of this brief *amicus curiae.* Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Consistent with its purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381, Congress, in enacting the Safety Act, expressly provided for a narrow scope of preemption of state authority. The text and structure of the Safety Act, as manifested in the express preemption provision of section 1392(d) and the savings clause of section 1397(k), demonstrate that Congress did not intend to preempt but rather to preserve respondents' tort claims.

1. By its terms, the Safety Act's express preemption provision prohibits the States from "establish[ing] or . . . continu[ing] in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d). This provision expresses Congress' limited purpose of preempting only state performance based safety standards such as those embodied in positive law (*e.g.*, statutes and regulations), not common law liability. The Safety Act's definitional section explains that the term " '[m]otor vehicle safety standards' means a minimum standard for motor vehicle performance, or motor vehicle equipment performance." *Id.* § 1391(2). As the Senate report explains, the Federal standard "will be analogous to a building code which specifies the minimum load-carrying characteristics of the structural members of a building wall, but leaves the builder free to choose his own materials and design." National Traffic And Motor Vehicle Safety Act of 1966, S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2714.

The conclusion that section 1392(d) does not preempt common law liability is buttressed by section 1392(f), which directs that "[i]n prescribing standards under this section, the Secretary shall . . . consult with the Vehicle

Equipment Safety Commission and such other State or interstate agencies (including legislative committees) as he deems appropriate." 15 U.S.C. § 1392(f). The Senate Report notes, "[t]he Secretary is directed to consult with the Vehicle Equipment Safety Commission, and such other State and interstate agencies, including legislative committees, as he deems appropriate, in order to utilize the experience existing in the States and to encourage them to adopt standards which are identical to the Federal ones." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2715.

Congress also recognized that industry councils can establish safety standards. It is clear, however, that Congress did not view the imposition of common law liability as "establish[ing]" or "continu[ing] in effect" a safety standard. 15 U.S.C. § 1392(d). As the Senate Report explains, "with the exception of a handful of State regulations and the Federal seat belt and brake fluid laws, the automobile sold generally in interstate commerce is today subject only to the standards produced by the committees of the Society of Automotive Engineers." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711. Congress thus did not view the imposition of tort liability as "establish-[ing]" or "continu[ing] in effect" a safety standard. Rather, it viewed the preemptive force of section 1392(d) as applying only to those non-identical safety standards adopted through the States' legislative or regulatory processes.

2. The conclusion that section 1392(d) does not preempt state common law liability is buttressed by section 1397(k). Entitled "[c]ontinuation of common law liability," section 1397(k) provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). By its plain terms, section 1397(k) expressly preserves negligence and defective design claims even when the Secretary has established a "standard applicable to the same aspect of performance." 15 U.S.C. § 1392(d).

The provision thus goes far beyond the general remedies savings clauses which the Court has traditionally subjected to conflict preemption analysis. *See, e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981). Rather, it codifies as a substantive rule the venerable common law principle that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." *Restatement (Second) of Torts* § 288C (1965). Thus, in a normal situation, a manufacturer's compliance with the Secretary's standards would constitute reasonable care and would not be negligent. On the other hand, the common law has long recognized that compliance with industry standards is not dispositive of the issue of negligence because "a whole calling may have unduly lagged in the adoption of new and available devices." *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.) (L. Hand, J.), *cert. denied*, 287 U.S. 662 (1932). Because even an expert agency can lag in the adoption of safety standards which reflect "new and available" technology, allowing common law actions serves the Safety Act's transcendent purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381.

None of petitioners' and their *amici*'s proffered constructions of section 1397(k) are persuasive. For example, petitioners suggest that section 1397(k) saves common law claims only until there is a federal standard on the subject. Pet. Br. 38 n.28. But if this is the case, then Congress had no need to enact the provision because section 1392(d) expressly preempts state standards only if the Secretary has established a safety standard. Likewise, the suggestion of petitioners' *amici* that section 1397(k) forecloses only field preemption analysis, *see, e.g.*, Br. *Am. Cur.* Products Liability Advisory Council 23, is contradicted by the text of section 1392(d), which explicitly recognizes that in the absence of an applicable

Federal standard the States retain authority to continue to enforce their existing standards and adopt new ones.

3. The preservation of common law actions is of particular importance given the constraints on NHTSA's efforts to update, through the rulemaking process, safety standards which no longer reflect current technology. In practice, NHTSA's rulemakings have been subject to "hard-look" judicial review. *See* Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. on Reg. 257, 277-86 (1987). The net effect of judicial review of NHTSA's rulemaking efforts has been to greatly limit the agency's power to improve the state of automotive safety technology and to arm the manufacturing industry with numerous weapons in its battles against the agency's rulemaking efforts. It has also led to lengthy delays, if not paralysis, in the promulgation of safety standards. *Id.* at 283; 295-97.

The standard at issue in this case demonstrates the halting pace of NHTSA rulemaking and the inappropriateness of granting petitioners a shield from liability under the guise of vindicating the supremacy clause. Notwithstanding that by the mid-1980's antilock brakes were in widespread and reliable use on trucks and other commercial vehicles in the United Kingdom and West Germany, *see* U.S. Department of Transportation, National Highway Traffic Safety Administration, *Improved Brake Systems for Commercial Motor Vehicles* § 3.3.3.3 (1991), NHTSA did not propose a rule requiring antilock brakes on trucks until June 1992. *See* 57 Fed. Reg. 24212 (1992). Assuming the rulemaking is not delayed by litigation, the antilock brake requirement will be implemented over the years 1996-1998, at least a decade after the technology was safe and reliable. *See* 59 Fed. Reg. 17326, 17328 (1994).

Under petitioners' view of sections 1392(d) and 1397(k), the existence of a NHTSA standard forecloses

a common law claim premised on the same aspect of performance regardless of whether the agency's standard reflects the current state of technology. Petitioners' view results in the preemption of claims even where a NHTSA standard reflects technology long since surpassed. It likewise undermines the Safety Act's purpose of reducing traffic accidents, deaths, and injuries. *See* 15 U.S.C. § 1381. Accordingly, the Court should reject it.

ARGUMENT

I. THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT DOES NOT PREEMPT STATE COMMON LAW CLAIMS

The determination as to whether federal law preempts state law is, of course, a question of congressional purpose. *See, e.g., CSX Transp., Inc. v. Easterwood*, 113 S.Ct. 1732, 1737 (1993); *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992). However, in recognition that under our federal system, the States play a significant role in protecting the health and safety of their citizens, every preemption inquiry " 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Cipollone*, 112 S.Ct. at 2617 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court has subsequently noted that this "strong presumption against pre-emption," *id.* at 2621, serves the vital "interest of avoiding unintended encroachment on the authority of the States." *CSX*, 113 S.Ct. at 1737.

Thus, in conducting preemption analysis, the Court has observed that in determining the scope of an express preemption provision, it "must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language" of the provision. *Cipollone*, 112 S. Ct. at 2621; *see also CSX*, 113 S. Ct. at 1739.

The presumption against preemption likewise requires that where Congress has spoken expressly as to the scope of preemption, the Court ordinarily must refrain from implied preemption analysis. *See Cipollone*, 112 S. Ct. at 2518. As the Court stated in *Cipollone*:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

Id. (internal citations omitted). As *amici* explain below, this rule applies with particular force where, as here, Congress has not only provided for a limited scope of preemption in the terms of a preemption provision, *see* 15 U.S.C. § 1392(d), but has also provided expressly for the saving of state law. *See id.* § 1397(k). Indeed, as its text, structure and legislative history make clear, the Safety Act expressly recognizes that the important task of improving motor vehicle safety requires not only federal regulation but also the preservation of state common law liability.

A. The Safety Act Does Not Expressly Preempt State Common Law Claims For Negligence Or Defective Design

In 1966, Congress, recognizing "that the current loss of life on our highways is unacceptably high," *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 33 (1983), enacted the National Traffic and Motor Vehicle Safety Act (Safety Act), 80 Stat. 718, 15 U.S.C. §§ 1381 *et seq.* The Safety Act, with its declared purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381, vests in the Secretary of Transportation the authority to "establish by order appropriate Federal

motor vehicle safety standards," which "shall be practicable, . . . meet the need for motor vehicle safety, and . . . be stated in objective terms." *Id.* § 1392(a); *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 33.

Consistent with its declared purpose of improving motor vehicle safety, Congress limited the extent to which the Act preempts state law. The text and structure of the Safety Act, as manifested in the express preemption provision of section 1392(d), and the savings clause of section 1397(k), amply demonstrate that Congress did not intend to preempt but rather to preserve respondents' claims.

In relevant part, the express preemption provision of section 1392(d) states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). By its terms, the statute expressly preempts only a (non-identical) state "safety standard applicable to the same aspect of performance of such vehicle or item of equipment." *Id.* Thus, even where the Secretary has established a standard, Congress limited section 1392(d)'s preemptive force to only state performance based safety standards such as those embodied in positive law (*e.g.*, statutes and administrative regulations) and not common law standards of liability.

That the term "safety standard" embodies only vehicle and equipment performance standards and not common law standards of liability is confirmed by the definition Congress gave to the term "[m]otor vehicle safety standards" in 15 U.S.C. § 1391(2). As set forth in the Safety

Act's definitional section, this term "means a minimum standard for motor vehicle performance, or motor vehicle equipment performance." 15 U.S.C. § 1391(2). As the Senate Report explains, "the new and revised standards are expected to be performance standards, specifying the required minimum safe performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance. . . . Such standards will be analogous to a building code which specifies the minimum load-carrying characteristics of the structural members of a building wall, but leaves the builder free to choose his own materials and design." National Traffic And Motor Vehicle Safety Act of 1966, S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2714.

The conclusion that section 1392(d) does not preempt common law liability finds additional support in other provisions of section 1392. Congress directed that "[t]he Secretary shall establish . . . appropriate Federal motor vehicle safety standards," 15 U.S.C. § 1392(a), and that "[i]n prescribing standards under this section, the Secretary shall . . . consult with the Vehicle Equipment Safety Commission and such other State or interstate agencies (including legislative committees) as he deems appropriate." *Id.* § 1392(f). As Congress understood, performance based safety standards are "establish[ed]" by legislatures and agencies, and not by the courts. As the Senate Report explains:

> The Secretary is directed to consult with the Vehicle Equipment Safety Commission, and such other State and interstate agencies, including legislative committees, as he deems appropriate, in order to utilize the experience existing in the States and to encourage them to adopt standards which are identical to the Federal ones. . . . The Vehicle Equipment Safety Commission is specifically mentioned because 44 States and the District of Columbia are members of this organization, and it is the major existing agency which has authority to propose uniform safety standards for the member States to consider for adoption.

S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2715.

It is clear that Congress did not view the imposition of common law liability as "establish[ing]" or "continu[ing] in effect" a safety standard. 15 U.S.C. § 1392(d). This conclusion is reinforced by another portion of the Senate Report explaining that "with the exception of a handful of State regulations and the Federal seat belt and brake fluid laws, the automobile sold generally in interstate commerce is today subject only to the standards produced by the committees of the Society of Automotive Engineers." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711. While Congress thus recognized that industry councils can establish safety standards, it is noteworthy that Congress did not view the imposition of common law liability as "establish[ing]" or "continu[ing] in effect" a safety standard.[2]

Ignoring the extensive evidence of Congress' limited purpose in enacting section 1392(d), petitioners assert that "[t]he critical term" in the provision is the word " 'standard,' " which in their view is "the normal term referring to the common-law duties imposed by tort law." Pet. Br. 30. Petitioners further note that "in *CSX v. Easterwood*, [the Court,] construing the phrase 'law, rule, regulation, order, or standard,' readily concluded that common-law duties 'fall within the scope of these broad phrases.' " *Id.* (quoting 113 S. Ct. at 1737).

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[2] With respect to the industry's standards, the Senate Report further noted that "[t]hese SAE standards are the product of a committee consensus, subject to a single manufacturer's veto," that "[t]here exist no procedures to compel their adoption, monitor their use, or evaluate their effectiveness," and, most importantly, that "there exists today no significant alternative source of standards to the SAE." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711. This passage provides further support for the conclusion that Congress did not view tort liability as establishing the type of performance based safety standards it preempted in section 1392(d).

The flaw in this argument is that section 1392(d) is not written so broadly as to preempt any state "standard" or any state "law, rule, regulation, order or standard." The word "standard" simply cannot be analyzed outside of the statutory context of section 1392(d). Rather, it must be construed in light of the statutory language, which expressly preempts only a state "safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d).

That Congress understood the terms "safety standard" and "common law standards of care" to be distinct terms of art is also supported by the Senate Report's discussion of the Safety Act's "effect on state law." As the Report explains, "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2720. Thus, while state law "standards of care" are, of course, standards, Congress did not view them as being "safety standard[s]" within the meaning of section 1392(d).[3]

Likewise, petitioners' view that section 1392(d) preempts state common law liability must be considered in light of the provision's language prohibiting the States from "establish[ing], or . . . continu[ing] in effect . . . [a] safety standard." 15 U.S.C. § 1392(d). Petitioners' view of section 1392(d)'s preemptive scope is simply ir-

[3] Petitioners rely on this same reference to argue that "[t]he use of the term 'standard' in referring both to the federal standards and to common-law duties confirms the natural meaning of 'standard' in Section 1392(d) as including common-law standards." *See* Pet. Br. 34 n.24. This argument likewise divorces the word "standard" from the statutory context. As explained above, Congress did not broadly preempt any state standard. Rather, it preempted "any safety standard applicable to the same aspect of [vehicle/equipment] performance." 15 U.S.C. § 1392(d).

reconcilable with Congress' recognition that, with respect to SAE standards. "[t]here exist no procedures to compel their adoption, monitor their use, or evaluate their effectiveness." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711. If, as petitioners argue, the imposition of tort liability "is designed to affect and does affect defendants' conduct," Pet. Br. 33, then surely it can "compel [the] adoption, monitor [the] use, or evaluate [the] effectiveness" of an industry standard. And if " '[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy,' " *Cipollone*, 112 S. Ct. at 2620 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)), then there is nothing voluntary about an industry standard when it is imposed through tort liability. *See, e.g., The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.) (L. Hand, J.) (noting "cases where courts seem to make the general practice of the calling the standard of proper diligence"), *cert. denied*, 287 U.S. 662 (1932). Nonetheless, Congress did not view the SAE standards as mandatory and noted that there were "no procedures to compel their adoption, monitor their use, or evaluate their effectiveness." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711.

As the foregoing demonstrates, Congress did not understand the imposition of common law liability as "establish[ing], or . . continu[ing] in effect . . . [a] safety standard." 15 U.S.C. § 1392(d). Rather, Congress understood the language it employed in section 1392(d) to preempt only non-identical state statutes and regulations prescribing a particular standard of motor vehicle and motor vehicle equipment performance. Even if imposing common law liability for negligent or defective design can be arguably understood as "establish[ing] . . . [a] safety standard," 15 U.S.C. § 1392(d), it does not follow that such claims are expressly preempted.[4] Rather, where a

[4] In common understanding, a verdict finding a manufacturer liable on a negligence or defective design claim does not "establish or continue in effect any safety standard." 15 U.S.C. § 1392(d). Notwithstanding that a verdict finding liability requires the pay-

statute is susceptible to differing interpretations, the presumption against preemption requires that absent a clear statement to the contrary, the Court must give effect to that interpretation which gives the greatest deference to state authority. *See, e.g., Cipollone*, 112 S. Ct. at 2621. As was noted in *Cipollone*, the Court "must fairly but—in light of the strong presumption against pre-emption—narrowly construe" section 1392(d). *Id.* "[F]airly but . . . narrowly construe[d]," section 1392(d) expresses a congressional purpose to preempt only non-identical state positive law and regulations prescribing a particular standard of vehicle or equipment performance, and not common law standards of care.

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ment of damages, it simply does not "settle, make or fix firmly" any safety standard. *Black's Law Dictionary* 546 (6th ed. 1990) (defining "establish"). Nor does it involve the "creat[ion]" or "enact[ing] permanently" of a standard. *Id.* As a leading authority explains,

> factual variations are of great significance in product liability cases. The facts surrounding a particular product injury—the manner in which the product was used, the role of the plaintiff or others in contributing to the injury, the condition of the individual product unit—are highly relevant in a product liability lawsuit.

Victor E. Schwartz & Liberty Mahshigian, *Offensive Collateral Estoppel: It Will Not Work In Product Liability*, 31 N.Y. L. Sch. L. Rev. 583, 587 (1986) (footnote omitted). Accordingly, outside of the context of asbestos and diethylstilbesterol (DES), courts have been unwilling to allow plaintiffs to engage in the offensive use of collateral estoppel in products liability litigation. *See* John S. Allee, *Product Liability* § 9.03[2] (1989); *see also Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 988 (Ohio 1983) ("non-mutual collateral estoppel may not be used to preclude the relitigation of design issues relating to mass-produced products when the injuries arise out of distinct underlying incidents").

Because of the numerous issues and factual differences raised in any case alleging that a manufacturer negligently or defectively designed automotive equipment, a verdict imposing liability would not estop a manufacturer from relitigating whether its design was negligent or defective in subsequent cases. Accordingly, the imposition of tort liability does not "establish" or "continue in effect any safety standard." 15 U.S.C. § 1392(d).

B. The Safety Act Expressly Preserves State Common Law Claims Even When NHTSA Has Promulgated An Applicable Safety Standard

1. The conclusion that the express preemption provision of section 1392(d) is a "reliable indicium" of Congress' purpose to preempt only state positive law and regulations prescribing vehicle performance standards and not state common law claims is buttressed by the savings clause of section 1397(k). Section 1397(k), which is entitled "continuation of common law liability," 15 U.S.C. § 1397(k), amply demonstrates that in enacting the Safety Act, Congress did not intend to preempt negligence and defective design claims even when the Secretary has established a "safety standard applicable to the same aspect of performance" of the vehicle or its equipment. *Id.* § 1392(d).

Section 1397(k) provides that:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. § 1397(k). By its plain terms, section 1397(k) expressly saves negligence and defective design claims even when the Secretary has established a "standard applicable to the same aspect of performance." In the ordinary sense of its terms, section 1397(k) does far more than save existing common law remedies. *Cf., e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981). Rather, it prescribes a substantive rule of decision by codifying the venerable common law principle that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." *Restatement (Second) of Torts* § 288C (1965). As the comment to § 288C explains:

> Where a statute, ordinance or regulation is found to define a standard of conduct for the purposes of negligence actions, . . . the standard defined is normally a minimum standard, applicable to the ordinary situations contemplated by the legislation. This legislative or administrative minimum does not prevent a finding that a reasonable man would have taken additional precautions where the situation is such as to call for them. . . . Where there are no such special circumstances, the minimum standard prescribed by the legislation or regulation may be accepted by the triers of fact, or by the court as a matter of law, as sufficient for the occasion; but if for any reason a reasonable man would take additional precautions, the provision does not preclude a finding that the actor should do so.

Id. cmt. a. *See also* W. Page Keeton *et al., Prosser and Keeton on Torts* § 36, at 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue. Such a standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions.").[5]

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[5] The Court has noted that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *see also United States v. Neustadt*, 366 U.S. 696, 707 (1961) (noting that "there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the [Federal] Tort Claims Act"); *cf. Molzof v. United States*, 112 S. Ct. 711, 716 (1992); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

Given the textual similarity of section 1397(k)'s command that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability," 15 U.S.C. § 1397(k), to such contemporaneous formulations of the common law as Restatement § 288C's that "[c]ompliance with . . . an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions," there is further reason to conclude that Congress, in enacting section 1397(k), intended that in liability suits, issues related to a manufacturer's compliance with the Secretary's standards would be resolved in accordance with common law principles.

The conclusion that section 1397(k) expressly preserves a common law claim even where the Secretary has promulgated an applicable federal standard is also supported by the legislative history. As the Senate Report indicates in its discussion of the Safety Act's "effect on state law," "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2720; *see also* 112 Cong. Rec. 14230 (1966) (statement of Senator Magnuson).

While petitioners acknowledge that section 1397(k)'s "use of 'compliance' language . . . suggest[s] contemplation of a 'compliance with administrative regulations' tort defense . . . rather than the ordinary language of savings provisions," *see* Pet. Br. 37 n.28 (quoting *Restatement* § 288C), they nonetheless ignore the import of their concession. Quite remarkably, they argue that "the language of Section 1397(k) cannot be viewed as more preservative of inconsistent state law than the sweeping savings clauses that have been held . . . to be *in*sufficient to oust conflict preemption." Pet. Br. 35 (emphasis in original).

The general remedies savings clauses which this Court subjected to conflict preemption analysis in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992), and *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), may well have been "sweeping." But the "sweep" of those clauses is naturally confined by their text. To say that "[n]othing in this act . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies,"

Abilene Cotton, 204 U.S. at 446, is to say nothing about Congress' preemptive purpose with respect to the underlying state substantive right. As the Court has noted, "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918); *see also Black's Law Dictionary* at 1294 (defining "remedy").

Thus, to subject a general remedies savings clause to conflict preemption analysis is to do no more than apply the traditional rule of statutory construction that " '[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one.' " *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 455 (1987) (emphasis in original) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)); *see also Morales*, 112 S. Ct. at 2037. It likewise embodies the principle that a court not give a statute a literal reading where it " 'would lead to absurd results . . . or would thwart the obvious purpose of the statute.' " *In Re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (quoting *Commissioner v. Brown*, 380 U.S. 563, 571 (1965)).

Here, however, Congress, undoubtedly aware of "the background rule of construction" of general remedies savings clauses, Pet. Br. 36, did not enact such a provision. Rather, as explained above, it enacted a specific substantive rule modeled on the common law rule that compliance with administrative regulations does not bar a finding of negligence if, under the circumstances, a reasonable person would have done more. *See* pp. 15-17, *supra*. If indeed, Congress had intended to enact only a general remedies savings clause, it had only to employ the language it used in such provisions as § 22 of the Interstate Commerce Act at issue in *Abilene Cotton*, and 49 U.S.C.

App. § 1506, the provision of the Federal Aviation Act of 1958 at issue in *Morales*.[6] Instead, Congress enacted a specific provision which, notwithstanding petitioners' contention to the contrary, *see* Pet. Br. 35, is far more preservative of state law than a general remedies savings clause.[7]

2. Petitioners also argue that "[n]othing in the language of Section 1397(k) refers to tort duties that conflict with federal standards." Pet. Br. 35. Petitioners thus reason that "[c]onflict preemption of a state-law duty that contradicts a federal policy . . . is not readily described as granting an 'exempt[ion]' based on 'compliance' with a federal standard. Rather, the state-law standard is rendered invalid by its inconsistency with federal law." *Id.* Petitioners also direly forecast that under the court

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[6] The reliance of petitioners' *amici*, American Trucking Ass'n *et al.*, on *Kalo Brick* and *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915), is likewise unpersuasive. *See* Br. *Am. Cur.* American Trucking Ass'n *et al.* 12-13. Both cases involved the Interstate Commerce Act's general remedies savings clause which was at issue in *Abilene Cotton*. *See Kalo Brick*, 450 U.S. at 328; *Puritan Coal*, 237 U.S. at 129-30. As explained above, section 1397(k) is not such a provision.

[7] Ignoring the ordinary meaning of section 1397(k)'s text, petitioners also argue that its placement five sections after the express preemption provision "lend[s] support to the notion that the provision was not withdrawing *any* of the preemption provided for in Section 1392(d)." Pet. Br. 37 n.28; *see also id.* at 36 n.26. The best evidence of section 1397's purpose is, of course, its text, *see, e.g., CSX*, 113 S. Ct. at 1737, and not its placement relative to section 1392(d). Moreover, it is difficult to understand why Congress' placement of the provision in the statutory section proscribing the manufacturing and sale of vehicles not in conformance with federal standards supports ignoring its plain meaning. *See* 15 U.S.C. § 1397(a). Claims such as respondents' arise only because a manufacturer or dealer has either manufactured and/or sold a vehicle. *See generally Prosser and Keeton On Torts* § 100, at 704-707. Congress' placement of the provision in section 1397 is thus consistent with its text, which demonstrates that subsection (k) is not a general remedies savings clause, but rather a codification of a common law rule.

of appeals' view, "all specific design standards, all federally approved options, and all determinations that a particular requirement would be affirmatively *dangerous* would have no preemptive effect on tort suits. Manufacturers could be held liable under state law even for doing precisely what the federal regulations *required* them to do." *Id.* at 36-37 (emphasis in original).

The short answer to this argument is that respondents' negligent design claims do not conflict with NHTSA Standard 121 or any NHTSA policy. *See* Br. United States 26-29. Thus, while Standard 121 "effectively gave manufacturers the choice of whether to install anti-lock brakes," Pet. App. 6a, NHTSA has not affirmatively promulgated an option as a matter of federal policy but has left the area unregulated. *See* Br. United States 26-29.

Moreover, as a matter of statutory construction, petitioners' argument simply ignores the efficacy of the common law rule and overstates the consequence of applying section 1397(k) as written. Here, the plain wording of section 1397(k), "which necessarily contains the best evidence" of Congress' intent, *CSX*, 113 S. Ct. at 1737, can be given full effect by allowing petitioners to raise their compliance with federal standards as an affirmative defense in accordance with the common law rule. *See Restatement* § 288C. Thus, "[w]here there is a normal situation . . . it may be found, and can be ruled as a matter of law, that the actor has done his full duty by complying with the statute, and nothing more is required." *Prosser and Keeton on Torts* § 36, at 233; *see also Restatement* § 288C, cmt. a (compliance with "the minimum standard prescribed by the . . . regulation may be accepted by the triers of fact, or by the court as a matter of law" as proof that the manufacturers' conduct was reasonable).[8]

[8] *Cf. Prosser and Keeton on Torts* § 33, at 195 ("Cases will no doubt be infrequent in which any defendant will be held liable for failing to do what no one in his position has ever done before.").

By definition then, the common law rule is adequate to protect petitioners from the unwarranted imposition of liability because in the normal situation, a manufacturer's compliance with the Secretary's standard constitutes reasonable care and thus would not be negligent. Moreover, in those instances in which a plaintiff seeks to impose liability on the theory that a manufacturer should have done something that the Secretary has affirmatively prohibited, *see* Br. *Am. Cur.* Product Liability Advisory Council 29-30, a manufacturer's compliance with federal law would likewise constitute reasonable care.

On the other hand, as the common law has long recognized, compliance with industry standards or custom is not necessarily dispositive of the issue of negligence because "a whole calling may have unduly lagged in the adoption of new and available devices." *The T.J. Hooper*, 60 F.2d at 740.[9] In like fashion, even an expert agency can lag in the adoption of safety standards which reflect "new and available" technology.[10] Where, for example, technology has long surpassed NHTSA's standards, allowing common law actions serves the Safety Act's transcendent purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381, by creating an incentive for manufacturers to "adopt[] new and available devices." *The T.J. Hooper*, 60 F.2d at 740. Allowing manufacturers to escape liability simply because they have complied with a NHTSA standard would be entirely inconsistent with the Safety Act's express purpose of promoting the development of safer motor vehicles and reducing the toll of traffic deaths and injuries.

[9] *See also Texas & Pacific Ry. v. Behymer*, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not.").

[10] This has unfortunately turned out to be the case with respect to NHTSA. *See infra*, pp. 24-30.

3. While petitioners and their *amici* do offer various explanations as to § 1397(k)'s meaning, none of their proffered constructions give reason to depart from enforcing the statute in accordance with its clear terms. *Inter alia*, petitioners argue that "[a]s to state tort standards that add to, without contradicting, federal standards on a subject, . . . the text of Section 1397(k) lend[s] support to the notion that the provision was not withdrawing *any* of the preemption provided for in Section 1392(d)." Pet. Br. 37 n.28. Thus, petitioners largely view section 1397(k) as saving common law claims only "*until* there were [uniform national] standards on a particular subject." Pet. Br. 38 n.28.

This argument begs the question of why Congress enacted § 1397(k) in the first place. If Congress intended to preempt common law tort claims that add to, without contradicting, the federal standard, then it would have stopped with section 1392(d), which, under petitioners' view (Br. at 30), expressly preempts common law actions establishing "any safety standard applicable to the same aspect of performance . . . which is not identical to the Federal standard." 15 U.S.C. § 1392(d). Likewise, if Congress intended to save common law claims only where the Secretary has not established a standard, it had no need to enact § 1397(k). By its plain terms, section 1392(d) expressly preempts state common law claims only "[w]henever a Federal motor vehicle safety standard established under [section 1392] is in effect." *Id.* Thus, where the Secretary has not established a standard, the States necessarily retain "authority . . . to establish, or to continue in effect" their own standards. *Id.* As the court of appeals observed, this proffered reading of petitioners would render section 1397(k) a redundancy. *See* Pet. App. 8a.

Equally unpersuasive is the suggestion of petitioners' *amicus* the Products Liability Advisory Council that "section [1397(k)] precludes only field preemption." Br. *Am. Cur.* PLC 23. In two respects the terms of the express preemption provision, section 1392(d), foreclose any argument that "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone*, 112 S. Ct. at 2617 (quoting *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

First, Congress expressly provided for preemption of the States' "authority either to establish, or to continue in effect" their safety standards only when the Secretary establishes a Federal standard "applicable to the same aspect of performance." 15 U.S.C. § 1392(d). Section 1392(d) thus explicitly recognizes that in the absence of an applicable Federal standard, the States retain authority to continue to enforce their existing standards and adopt new ones. Second, Congress expressly provided that a State and its political subdivisions could establish safety requirements "impos[ing] a higher standard of performance than that required to comply with the otherwise applicable Federal standard" when "procur[ing vehicles] for [their] own use." *Id.* By expressly recognizing the authority of the States to impose safety standards and thus "supplement" the Federal scheme, these two provisions demonstrate that in enacting the Safety Act, Congress did not intend to occupy the field of motor vehicle safety regulation.

Nor is there any merit to petitioners' and their *amicus* PLC's alternative constructions of section 1397(k) as "negat[ing] mere compliance with existing government standards as a complete defense at trial," Br. Am. Cur. PLC 23, or as "reaching no further than to deny that mere compliance with all NHTSA standards automatically would defeat common-law duties." Pet. Br. 38-39. Contrary to petitioners' and their *amicus*' suggestion, this narrow view of section 1397(k) as embodying the nega-

tion of a generalized defense is foreclosed by the statutory text. Section 1397(k) simply does not speak in general terms; it does not state that "compliance with *the* Federal motor vehicle safety *standards* . . . does not exempt any person from any liability." Rather, it states that "[c]ompliance with *any* Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law," 15 U.S.C. § 1397(k) (emphasis added), and thus expressly recognizes that common law actions alleging negligent design or a design defect are preserved even when a manufacturer has complied with an applicable federal standard.

II. STATE COMMON LAW ACTIONS ENHANCE MOTOR VEHICLE SAFETY AND ARE A NECESSARY ADJUNCT TO NHTSA RULEMAKING EFFORTS

Construing section 1397(k) as saving common law actions even when the Secretary has established an applicable standard is entirely consistent with Congress' express declaration of the Safety Act's purpose "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. Historically, the automobile industry was reluctant to improve the safety of its product. As the Senate Report noted:

> [T]he committee met with disturbing evidence of the automobile industry's chronic subordination of safe design to promotional styling, and of an overriding stress on power, acceleration, speed, and 'ride' to the relative neglect of safe performance or collision protection. The committee cannot judge the truth of the conviction that 'safety doesn't sell,' but it is a conviction widely held in industry which has plainly resulted in the inadequate allocation of resources to safety engineering.
>
> Until the industry had been subjected to the prod of heightened public interest and governmental concern, new models showed little improvement in safe design or in the incorporation of safety devices. Such elemental safe design features as safety door latches made their appearance as standard equipment only a decade after their desirability and feasibility had been established.

S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2710.[11]

Allowing common law actions—notwithstanding a manufacturer's compliance with NHTSA's standards—simply recognizes that such compliance should not be dispositive of the issue of negligence because "a whole calling may have unduly lagged in the adoption of new and available devices." *The T.J. Hooper*, 60 F.2d at 740. It thus serves the Safety Act's transcendent purpose of reducing "deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The preservation of common law actions is of particular importance given the constraints on NHTSA's efforts to update, through the rulemaking process, safety standards which no longer reflect current technology.

For example, an agency may desire to update a standard to reflect available technology but lack the resources necessary to provide an adequate record to preserve the rulemaking from judicial invalidation. *See* Stephen Breyer, *Judicial Review Of Questions Of Law And Policy*, 38 Admin. L. Rev. 363, 393 (1986); Mashaw & Harfst, *The Struggle For Auto Safety*, at 80-83. Indeed, notwithstanding the supposedly deferential "arbitrary" and "capricious" standard of review of agency rulemaking

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[11] *See also* Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety* 4 (1990) ("[N]othing much seemed to be changing in the design of the automobiles that were being produced—at least not in their *safety* design. In the 1950s and early 1960s, automobile 'design' meant automobile 'styling.' The urgent design questions seemed to concern tail-fin height and the shape of the grill."); Ralph Nader & Joseph A. Page, *Automobile Design and the Judicial Process*, 55 Cal. L. Rev. 645, 647 (1967) (noting that "self-regulation by the auto industry has so far not materialized").

mandated by section 10(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(a), in practice NHTSA's rulemakings have been subjected to the "hard-look" approach to judicial review epitomized by *Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), and other decisions. For example, under the guise of section 4 of the APA, 5 U.S.C. § 553(c), which requires that the agency consider the views of interested persons, lower courts have required that the agency address the "major issues" raised in the course of the rulemaking proceeding and respond thereto. *See Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). Thus, "[t]he Agency's failure to respond to significant issues of either fact or policy raised by a participant . . . provide[s] a straightforward basis for judicial challenge to the rationality of the Agency's rule." Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. on Reg. 257, 277 (1987).

In subsequent cases, the courts imposed additional substantive and procedural requirements that have all but assured the demise of regulation through standard setting. These include the requirements that the agency provide affected parties with the opportunity to comment on any modifications to its rule made in response to a manufacturer's objection, *see id.* at 286 (discussing *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972)), that it support a proposed standard with "on-the-road evidence of safety effects," *see id.* at 279-80 (discussing *H & H Tire Co. v. Department of Transp.*, 471 F.2d 350 (7th Cir. 1972)), that it respond to manufacturers' claims that a standard imposed excessive costs even though only the manufacturers had the data and could not be required to disclose it to the agency, *id.*, and that it provide complete specifications for testing equipment's performance characteristics. *Id.* at 282-83 (discussing *Chrysler Corp. v. Department of Transp.*,

472 F.2d 659 (6th Cir. 1972)).[12] The net effect of these decisions has been to limit NHTSA's power to improve the state of the art in automotive safety and to arm the manufacturing industry with numerous weapons in its battles against the agency's rulemaking efforts.

Moreover, because judicial review of NHTSA's rulemaking has generally focused on the agency's "decision process" rather than "decision product," the courts frequently "invalidate reasonable judgments that are badly explained or perhaps inexplicable in straightforward logical fashion." *Id.* at 294. As Mashaw and Harfst explain, because "[t]he fits, starts, and reversal of real decisionmaking look, from a rational-analytic perspective, like the fumblings of an incompetent or misguided administrator . . . no administrator will find it prudent to reveal the agency's real process of decision." *Id.* This only serves to create a strong incentive for the agency to preserve the status quo. *Id.*; *see also* Breyer, *supra*, at 391.

Likewise, the focus of judicial review on the process of the agency's decision has led to lengthy delay, if not paralysis, in the promulgation of rules and has given manufacturers every incentive to flood the rulemaking record with objections so as "to force the Agency to document the technical merits of any detail in its standards." Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety, supra*, at 283; *see also id.* at 295-97. This leads to even more delay as the

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[12] As Mashaw and Harfst explain, the *Chrysler* decision was particularly paralytic to NHTSA's rulemaking efforts for two reasons. First, it placed the burden of developing testing equipment on the agency rather than the industry, even though "the [a]gency has a minuscule research budget, and virtually all automotive technology development (including that of performance testing devices) goes on within the industry." *Regulation and Legal Culture, supra*, at 282. Second, it imposed new burdens on NHTSA because the manufacturers' objection "was but one of scores thrown at the Agency in the [rulemaking] proceeding . . . [and] suggested that every objection should be given equal rebuttal effort whatever its intrinsic merit." *Id.*

agency assigns numerous staff members to " 'flyspeck' the rulemaking record and . . . 'remand' it within the agency for revision prior to promulgation." *Id.* at 296. And in those instances in which a reviewing court finds the agency record to have been inadequate and remands the proceeding, even longer delay occurs, as staff long since reassigned, revisit the rule in a changed "political, economic, and technological context that will radically alter the perceived rationality of the rule." *Id.* at 295. In such situations, "[d]elay will be measured in years." *Id.*

The standard at issue in this case demonstrates the halting pace of NHTSA rulemaking and the inappropriateness of granting petitioners a shield from liability under the guise of vindicating the supremacy clause. Notwithstanding that by the mid-1980's antilock brakes were in widespread and reliable use on trucks and other commercial vehicles in the United Kingdom and West Germany, *see* U.S. Department of Transportation, National Highway Traffic Safety Administration, *Improved Brake Systems for Commercial Motor Vehicles* § 3.3.3.3 (1991),[13] NHTSA did not propose a rule requiring antilock brakes on trucks until June 1992. *See* Federal Motor Vehicle Safety Standards, Stability and Control Requirements for Medium and Heavy Duty Vehicles, 57 Fed. Reg. 24212 (1992) (proposed June 8, 1992). As currently proposed, the agency will implement its regulation, depending on vehicle type, over the years 1996 through 1998, at least a decade after such technology was safe, reliable, and in widespread use in other industrialized nations. *See* Federal Motor Vehicle Safety Standards, Stability and Control Requirements for Medium and Heavy Duty Vehicles, 59 Fed. Reg. 17326, 17328 (1994) (supplemental notice

[13] *See also generally* U.S. Department of Transportation, National Highway Traffic Safety Administration, *European/Australian Experience with Antilock Braking Systems in Fleet Service* (1988); *see also* U.S. Congress, Office of Technology Assessment, *Gearing Up for Safety: Motor Carrier Safety in a Competitive Environment* 120, 122 (1988).

of proposed rulemaking, Apr. 12, 1994). If past experience is any guide, the agency's proposed implementation schedule may prove rather optimistic as industry challenges to the rule's validity forestall its taking effect.[14]

In petitioners' view, the existence of a NHTSA standard forecloses a common law claim premised on the same aspect of performance regardless of whether NHTSA's standard reflects the current state of technology. This is especially troubling in light of the criticism that NHTSA's standard-setting efforts "ha[ve] been largely ineffectual in forcing automotive technology" and that its rules only "required modest, incremental improvements in the safety technology of conventional vehicles." Mashaw & Harfst, *The Struggle For Auto Safety* at 70. Indeed, petitioners' view results in the preemption of claims even where a NHTSA standard reflects technology long since surpassed.[15] Adopting it would create a substantial incentive for manu-

[14] The Court is, of course, well aware of the tactics employed by some manufacturers in challenging NHTSA's standards and their costs. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). At issue in *Motor Vehicle Mfrs.* was NHTSA's passive restraint rule, FMVSS 208, 49 C.F.R. § 571.208, first proposed in 1969. 463 U.S. at 34-35. In commenting on the challenge to proposed Standard 208's airbag requirement, this Court observed that "[f]or nearly a decade, the automobile industry waged the regulatory equivalent of war." *Id.* at 49.

The Court also observed the lengthy delay entailed in promulgating Standard 208, which "[o]ver the course of approximately 60 rulemaking notices, [was] imposed, amended, rescinded, reimposed, and . . . rescinded again." 463 U.S. at 34. Further delay occurred on remand as the standard was amended again and subjected anew to judicial review. *See Public Citizen v. Steed*, 851 F.2d 444, 445-46 (D.C. Cir. 1988); *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 477-78 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). In total, the promulgation of the passive restraint rule has been some twenty years in the making.

[15] Indeed, as Mashaw and Harfst note, "in some respects NHTSA's first rules were even less stringent than the GSA standards on which they were based." Mashaw & Harfst, *The Struggle For Auto Safety*, at 74.

facturers to refrain from developing new technology [16] and hold the public safety hostage to manufacturers' delaying tactics and bureaucratic inertia.

Ironically, petitioners read the Safety Act as consigning to the scrap heap not the industry's unsafe and outdated technologies, but rather the longstanding and efficacious common law rules recognizing that while compliance with government standards or industry practice may be evidence of reasonableness, it is not always its measure. Not only is petitioners' construction at odds with the statutory purpose of sections 1392(d) and 1397(k), it also frustrates Congress' express purpose of reducing the toll of traffic accidents, deaths and injuries. *See* 15 U.S.C. § 1381. The Court should not countenance such a result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 13, 1994

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[16] As a leading authority explains, "if the only test is to be what has been done before, no industry . . . will ever have any great incentive to make progress in the direction of safety." *Prosser and Keeton On Torts* § 33, at 195.

Supreme Court, U.S.
FILED
DEC 13 1994
OFFICE OF THE CLERK

No. 94-286 (15)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION, *ET AL.*,
Petitioners,

v.

BEN MYRICK, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

BRIEF FOR PUBLIC CITIZEN, INC. AS *AMICUS CURIAE* URGING AFFIRMANCE

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In the

Supreme Court of the United States

October Term, 1994

No. 94-286

FREIGHTLINER CORPORATION, *ET AL.*,
Petitioners,

v.

BEN MYRICK, *ET AL.*,
Respondents.

BRIEF FOR PUBLIC CITIZEN, INC. AS *AMICUS CURIAE* URGING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*

Public Citizen, Inc. is a nonprofit organization with approximately 100,000 members nationwide. Among its major areas of attention have been the prevention of injury to consumers from unreasonably dangerous products and assuring that accident victims can obtain adequate redress for their injuries in the courts. To realize these goals, Public Citizen has long recognized that there must be both strong regulations and an effective tort system, because each complements the other. Moreover, while both systems have a role in preventing unsafe products, it is only the tort system that provides compensation for injured victims.

Public Citizen's President, Joan B. Claybrook, is a former Administrator of the National Highway Traffic Safety Administration ("NHTSA"), which has regulatory jurisdiction over the air brakes involved in this case. Public

Citizen's founder and former President is Ralph Nader, whose pioneering work is largely responsible for the passage of the National Highway Traffic Safety Act of 1966, 49 U.S.C. § 30101 *et seq.* (1994 Supp.)(the "Highway Safety Act"), which gave NHTSA its principal regulatory powers. As a result of the work of Ms. Claybrook, Mr. Nader and others who have effectively enforced the Highway Safety Act, there has been a vast improvement in safety of automotive vehicles in the United States, resulting in the savings of thousands of lives and the prevention of untold injuries. At the same time, there continue to be thousands of crash victims needlessly injured on our nation's highways—victims whose common law rights to seek compensation are expressly preserved by the Highway Safety Act. *Id.*, § 30103(e).

Public Citizen's expertise regarding regulatory issues extends beyond auto safety and includes matters subject to regulation by agencies such as the Food and Drug Administration, the Occupational Safety and Health Administration, the Nuclear Regulatory Commission, the Consumer Product Safety Commission and the Federal Aviation Administration. Each of those agencies issues important safety rules, and yet, as we explain below, none of them can do the job of protecting American lives on its own. Nor can NHTSA here. In this brief, which is filed with the consent of the parties, we explain why the regulatory system cannot reasonably be expected to be the sole protector of the safety of the products or services sold to American consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although not so plainly stated, the position of petitioners and their *amici* is that, once a federal agency issues a safety standard on a given subject, state laws which give rise to a claim for monetary damages for personal injuries involving the same subject-matter may not impose a duty of care greater than that imposed by the federal standard, because to do so would be "inconsistent" or create a "con-

flict" with the federal standard. This is true, petitioners and their *amici* argue, no matter how long ago the federal standard was issued, how inadequate it may be in light of more recent technology, or even how inexpensive it would be for the manufacturer to remedy a particular defect or problem.

The briefs for respondents and their other *amici* will demonstrate the legal fallacy of the assumption that Congress intended standards issued by NHTSA to preclude common law claims for damages on the theory that the Highway Safety Act operates as a minimum and a maximum, both as a regulatory matter and in the tort system. In this brief, we analyze the strengths and weaknesses of our regulatory system in order to demonstrate why Congress surely did not, nor would it have wanted to, put all its safety eggs in the basket of regulation, let alone to tie the right to compensation for death or personal injury to whatever standard the regulatory agency had issued. Before turning to that discussion, however, we offer this cautionary example to illustrate the hazards of using regulatory standards as the be-all and the end-all for defining an acceptable level of public safety.

The *Titanic* carried 2227 passengers and crew on its maiden (and final) voyage in April 1912; 1494 of them died after the ship hit an iceberg and sank. At the time of this tragedy, the *Titanic* carried 16 lifeboats with room for 980 people, thus satisfying maritime safety regulations set by the British Board of Trade. Indeed, the *Titanic* exceeded this standard by carrying four additional collapsible boats which could handle another 196 people.

The Board of Trade's lifeboat standard had been set in 1894, when the largest vessel afloat was approximately one-quarter the size of the *Titanic* and other, new "super liners" such as the *Lusitania* and the *Mauretania*, which employed the most modern shipbuilding techniques and carried far more passengers than their predecessors. The Board of Trade was not oblivious to this development; in fact, an

advisory committee met to discuss the lifeboat standard in early 1911, but the committee concluded that the 17-year-old regulation was adequate. A year later, nearly 1500 people were dead in a single accident. *See* John P. Easton and Charles A. Haas, TITANIC: DESTINATION DISASTER 113-14 (1987); John Dudman, THE SINKING OF THE TITANIC 13 (1988); Paul Eddy, Elaine Potter and Bruce Page, DESTINATION DISASTER 31 (1976).

Under petitioners' view of the law, which they ask this Court to embrace, a maritime safety rule of this sort would *—and should—*immunize a cruise line from liability, even in situations where two-thirds of its passengers are killed and such a loss of life could have been prevented. Merely to state the proposition advanced by petitioners and their *amici* is to expose its essential hollowness and to demonstrate why the arguments addressed here should be rejected.

ARGUMENT

CONGRESS WOULD NOT HAVE MADE VIOLATION OF REGULATORY STANDARDS THE *ONLY* BASIS FOR TORT RECOVERY.

A. Regulatory Agencies Cannot Reasonably Be Expected To Eliminate All Unreasonable Hazards in Products Under Their Jurisdiction.

Petitioners' unstated thesis is that Congress assumed that regulatory agencies would effectively eliminate all unreasonable risks in automobiles and trucks, with the result that there would be no need for the tort system to make those products safe. As respondents argue, the Highway Safety Act's savings clause (49 U.S.C. § 30103(e)) and its legislative history make clear that Congress had no such intent in the area of motor vehicle safety; indeed, Congress specifically provided that the tort and regulatory systems would operate in tandem, as they have done for nearly 30 years.

As we now show, it was not only sensible for Congress to have taken such a position, but the contrary position urged by petitioners—that Congress intended to place sole reliance on the regulatory approach to assure safe vehicles—would have been foolhardy.

A federal safety standard, such as the one at issue here, is a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(4), *i.e.*, "an agency statement of general or particular applicability and future effect . . .." As such, agency rules generally can apply only on a future or prospective basis. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Standards of this sort cannot help past accident victims or their families, for example, by directing the payment of monetary damages to those victims. Nor, obviously, can they undo the death or injury that took place. What safety standards can do, however, is try to prevent similar deaths or serious injuries from happening in the future.[1]

By contrast, the tort system operates on a retrospective basis. Each case requires an examination of the particular facts regarding a particular accident victim and a particular manufacturer. The goal is to provide relief, often in the form of monetary damages, to accident victims who can satisfy basic state law tort standards for recovery. The goal is not to legislate a broad rule of general applicability, although individual judgments may force a manufacturer to alter its conduct to avoid future liability.

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[1] In the case of rules affecting product design, such as standards for automobiles and trucks, standards must not only be prospective, but issued sufficiently far in advance to permit the new safety standard to be incorporated into the design and manufacture of the vehicle. The necessary lead-time can be years. But where a product has been shown to be defective in practice, the tort system provides a powerful incentive to the manufacturer to rectify the problem as soon as it arises, rather than waiting for a federal standard to take effect.

There is, of course, significant cross-fertilization between the two fields. Information obtained in individual tort suits often informs the judgment of federal regulators about whether existing standards are adequate, or whether new protections should be proposed. Similarly, the standards set by federal agencies are useful benchmarks for the finders of fact in particular tort cases, although compliance with federal standards are generally only evidence of due care, not an absolute defense. *See generally* RESTATEMENT (SECOND) OF TORTS § 288(C)(1964). That is as it should be, for the regulatory system and the tort system complement each other, helping to anticipate problems before they occur and providing relief when accidents do happen.

Petitioners' argument might have some appeal if we lived in a world where perfect regulation was the norm, *i.e.*, where agencies always have access to data enabling them to pinpoint precisely what problems should be solved and in what order, so as to advance public safety to the greatest extent possible; where agencies never lack the personnel, technical data, and other resources needed to deal with potential safety hazards; where regulations are immediately issued once the agency identifies a problem requiring a solution; where rules are swiftly updated to reflect design changes (as in the automobile industry), technological advances, or scientific knowledge in the field; where regulatory decisions are made by politically insulated agencies, free from untoward pressure from congressional committees and powerful industry lobbying groups; and where rules operate perfectly without unintended consequences or trade-offs.

There are a number of reasons why the regulatory system does not always work that way and why the Court should reject the implicit notion that Congress viewed the tort system as somehow at war with federal regulations in those areas where the regulators have taken some action to deal with a safety problem. As a way of understanding why this is so, let us start with the fact that the process of setting federal safety standards can be time-consuming. At the

outset, the agency must obtain enough information to make a preliminary judgment that there is a problem of sufficient magnitude to warrant a rulemaking proceeding. In making this judgment, as well as any subsequent judgments about whether and how to proceed, there is often an information gap between the agency and the regulated industry that can affect the pace and ultimate disposition of any regulatory effort. The regulated industry almost invariably has greater information and technical expertise than its regulators, who face a constant challenge in trying to extract information with which to make their own informed judgment. Nor does industry have any incentive to furnish objective, unbiased information to regulators.

The "information gap" problem is complicated by the fact that various agencies cannot generally compel the production of information, except in the context of an enforcement proceeding. Even for agencies which can compel the production of documents, they must operate in a way that is mindful of the strictures of the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, which complicates the data-collection activities of agencies and is often invoked by the regulated industry as a way to prevent agencies from obtaining data needed to initiate a rulemaking proceeding.[2]

Moreover, in most instances, a regulated industry will have little incentive to volunteer the data that an agency needs, and experience suggests that the industry devotes most

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[2] One example illustrates our point. Although silicone-gel breast implants had been on the market for decades, the FDA had not conducted a review of their safety—even after the passage of the Medical Device Amendments of 1976, 21 U.S.C. §§ 360c *et seq.*, clearly gave the agency authority. The FDA's inquiry into the safety of the implants was largely sparked by data casting doubt on the safety of the implants obtained by lawyers handling product liability cases, who in turn submitted it to the FDA. *See* DeBenedictis, *FDA Action Spurs Implant Suits*, 78 A.B.A.J. 20 (March 1992).

of its energy to persuading the agency *not* to regulate, indeed, not even to open a rulemaking proceeding. It is very rare to see an industry initially respond to potential rulemaking initiatives by saying "We don't think there is a need to regulate, but here are all the data you need, and if you decide to regulate, here are several approaches you could try."[3]

Apart from these practical limitations on obtaining adequate information with which to regulate, the rulemaking process suffers from delays as a result of various requirements imposed on agencies under the Administrative Procedure Act or the agency's organic statute, which are designed to incorporate certain "due process" guarantees into the process. In addition, exogenous statutes such as the Paperwork Reduction Act, the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, impose additional requirements that the agency must factor into its calculus about whether and how to regulate. Also, since at least 1981, agencies have had to follow the dictates of Executive Orders that add additional procedural requirements agencies must follow as a precondition for issuing a rule.[4]

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[3] To be sure, if it subsequently becomes clear that an agency firmly intends to issue a standard, the affected industry may grudgingly provide information indicating what (from its view) would be the most cost-effective or least intrusive way to proceed, but such data rarely appears as the industry's initial response after a regulation is proposed.

[4] Indeed, out of concern that the rulemaking process has become "ossified" or overly "encrusted," the prestigious Administrative Conference of the United States has urged Congress to refrain from enacting any new procedural requirements that further encumber the rulemaking process. Administrative Conference of the United States, Conference Recommendation 93-4, *Improving the Environment for Agency Rulemaking* (1993).

Thus, it can and does take years to draft and adopt major safety standards. *See, e.g., Public Citizen Health Research Group v. Auchter,* 702 F.2d 1509 (D.C. Cir. 1983); 796 F.2d 1479 (1986); 823 F.2d 626 (1987)(describing OSHA's halting, multi-year efforts to impose a standard for ethylene oxide). This factor is relevant here for several reasons. First, agencies have finite resources, and there is only a limited number of safety standards that an agency can issue in a given year. Second, even if an agency adopts a rule requiring use of today's state-of-the-art technology, subsequent changes in technology or scientific knowledge may render that rule an anachronism in terms of the level of safety that should be required. Third, as a practical matter, the agency's limited resources may preclude it from revisiting existing rules which have become outmoded because of technological or scientific advances.[5]

Equally problematic is the fact that agency rules are often issued with a clear understanding that they do not fully protect the public from unreasonable risks. For instance, the vast majority of OSHA's health standards are based on industry consensus standards adopted by the agency on a wholesale basis in the early 1970s under 29 U.S.C. § 655(a). *See AFL-CIO v. OSHA,* 965 F.2d 962 (11th Cir. 1992)(invalidating OSHA's effort to update these standards without full-scale rulemaking). These standards were recognized as inadequate when they were adopted over 20 years ago, and,

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[5] OSHA's rulemaking experience is instructive in this regard. Since its creation in 1971, OSHA has issued barely two dozen regulations governing the permissible level of worker exposure to toxic substances. The slow pace of OSHA's rulemaking is directly attributable to the factors canvassed above. *See* Thomas O. McGarity and Sidney A. Shapiro, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Praeger, 1993).

by now, they are even more woefully out of date.[6] Nonetheless, under petitioners' theory, workers injured by exposure to high levels of these substances should be stripped of their state law remedies, merely because OSHA has some "standard" covering them.

Thus, a rule of law under which federal safety standards set a ceiling on the protection available pursuant to state tort laws would create perverse results that Congress could not have intended when it enacted the Highway Safety Act in 1966. According to the reading advanced by petitioners and their *amici*, accident victims are able to recover fully for their injuries under state tort law so long as NHTSA fails to adopt a rule on a given topic. However, once a rule on that topic is enacted, accident victims would lose their right to hold a manufacturer who complied with the federal standard liable for their injuries, even in cases where the manufacturer knew that the injury could have been prevented by using an inexpensive, off-the-shelf technology. It is difficult to believe that Congress's decision to empower NHTSA to adopt safety standards designed to prevent injury was also a license to deprive accident victims of recovery when readily available measures would have prevented the injury.

There is a separate reason for rejecting the notion that a federal safety standard should preempt a manufacturer's liability in a tort case. Let us take the type of situation that petitioners might regard as their strongest case, *e.g.*, FDA pre-clearance of medical devices before those devices are licensed for use by the public, or the FAA's process for

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[6] Indeed, the Senate Report on this section of the Occupational Safety and Health Act recognized the interim nature of these standards: "a large proportion of the voluntary standards are seriously out-of-date. Many represent merely the lowest common denominator of acceptance by interested private groups." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 6 (1970), *reprinted in* [1970] U.S. Code Cong. & Admin. News 5177, 5182.

certifying that a new aircraft type meets federal airworthiness standards and should be available for use by the flying public. Suppose that design defects, latent flaws, or other problems turn up or are not addressed in an agency's preclearance review process. According to petitioners, if the manufacturer knew of the problem, but nonetheless took no action to correct it, a tort victim would still go remediless.

Let us take real-life examples. For instance, suppose the FDA approved the design of a heart valve for use on humans, yet, when used, the valve failed at an unacceptably high rate because of manufacturing defects. Or suppose that a manufacturer of heart catheters fraudulently obtained the FDA's marketing approval by failing to provide the agency with data showing that the catheter had a propensity to malfunction in a way that could cause serious harm or deaths to patients. There have been a number of decisions by federal courts of appeals on the question of whether the Medical Device Amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. § 360c *et seq.*, in precisely these circumstances preempt state law tort law remedies for products that have been approved for use by the Food and Drug Administration, but, in practice, have proven to pose unreasonable risks to patients. Although the circuit courts are split on this issue, *compare, e.g., Mendes v. Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994), *with National Bank of Commerce of El Dorado v. Kimberly-Clark Corp.*, __F.3d___, 1994 WL 580798 (8th Cir., Oct. 25, 1994), the FDA has now taken the position—apparently with the approval of the Solicitor General—that there is no broad preemption. *See* Brief for the United States as *Amicus Curiae* in *Linda Talbot et al. v. C.R. Bard et al.*, No. 94-1951 (1st Cir.). The core reason cited by the government is the same we argue here—namely, that federal regulatory requirements do nothing to compensate injured victims, and that courts should be particularly hesitant to conclude that Congress intended to deprive tort victims of their state law remedies unless there has been a clear and definitive statement by Congress to that effect.

Similarly, the Federal Aviation Administration requires aircraft manufacturers to satisfy airworthiness standards before a new aircraft type can be certified for use in commercial aviation. Under one FAA rule, 14 C.F.R. § 25.803(c) and Part 25, App. J (1994), a manufacturer must run a test demonstrating that a planeload of passengers can be evacuated within 90 seconds with half the exit doors blocked. Inevitably, the test will not replicate the actual cabin environment after a crash. In the first place, participants know in advance they are taking part in a test, so there is not the panic or disorientation which can occur in real accidents. Moreover, the rule requires only "minor obstructions" (such as blankets and pillows) in the aisles or near the exists. 14 C.F.R. Pt. 25, App. J(k). In a real test, passengers may have to climb over seats which are dislodged by the crash and block the aisles; passengers may also have to deal with smoke and toxic fumes, which often fill the cabin in survivable accidents where fire is present. Finally, the rule does not limit a manufacturer to one test only, so it is possible to keep running this test as many times as is needed until everyone gets out within 90 seconds.

Under petitioners' theory, the fact that a manufacturer can meet this test once, even after many failures, would bar any state tort claim which has the effect of challenging the FAA rule as inadequate, even if the FAA test bears little relation to what happens in an actual crash. The irony of this argument is illustrated when one also considers how in October 1991, during a test designed to prove that McDonnell Douglas's MD-11 aircraft should be approved as safe for public use, 44 people were injured and one person paralyzed during a controlled evacuation of the sort described above. *See* Ralph Nader and Wesley Smith, COLLISION COURSE: THE TRUTH ABOUT AIRLINE SAFETY 188-89 (1994).

Accordingly, even if an agency has adopted detailed safety standards on every known hazard within its jurisdiction, and even if an agency has elaborate pre-clearance

review processes that a manufacturer must pass before its products are used by consumers, those efforts may still be inadequate to protect public safety. And, because automobile manufacturers subject to the Highway Safety Act do not have to obtain premarket clearance of their vehicles, even though they regularly make significant changes affecting a vehicle's safety performance, there is surely no basis to conclude that Congress intended to transform NHTSA's regulatory floor into a ceiling on tort standards.

B. Regulatory Preemption May Be Found, If At All, Only In Situations Far Removed From the One Here.

In this section of the brief, we address the question of whether, and under what circumstances, an agency's decision to regulate may be treated both as a ceiling as well as a floor on a state's ability to impose tort liability. Although that is petitioners' core contention, we do not believe that question is presented in this case for a single yet critical reason: Unlike many other statutes, the Highway Safety Act contains an express "savings clause," 49 U.S.C. § 30103, which states emphatically that "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."

However, Public Citizen does not take the position that there are no situations in which an agency's decision to regulate should not be treated as a ceiling as well as a floor —just that those situations are few and far between. The current case, involving NHTSA's regulation of air brakes, provides a useful point of reference. In 1978, the Ninth Circuit struck down an earlier version of NHTSA's rule (FMVSS 121) requiring antilock brakes on all trucks and trailers, citing evidence indicating that antilock brakes were potentially more hazardous than standard brakes and remanding the rule to NHTSA for further consideration. *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). On remand, the agency conceivably could

have issued a rule forbidding the use of antilock brakes on trucks. In that event, conflict preemption principles might bar a tort claim based on the failure to have air brakes on a truck, although such a defense would have to surmount the hurdle of the Act's savings clause. But NHTSA did not issue such a rule, as petitioners concede, and thus all of petitioners' discussion of "conflict" preemption is irrelevant to this case.[7]

Regulatory preemption in a given situation might thus occur in another way as well. Suppose that in the course of a rulemaking proceeding, the FDA decided that only synthetic materials can be used for heart valves; the use of natural valves, from pigs and other animals would not be approved, because, on balance, synthetic valves were deemed superior. In that situation, if FDA made a clear-cut choice about the material to be used to manufacture heart valves, it might plausibly conclude that it would be unreasonable to allow juries to second-guess that choice by saying that synthetic valves were unsafe because another material had not been chosen. The agency might feel particularly confident in preempting state law if its analysis of the choices pointed clearly in one direction. In that situation, the FDA might reasonably determine that it was necessary not simply to make a choice, but to preclude the tort system from making a contrary one.

Assuming that such a decision was within FDA's statutory authority, and further assuming that the FDA wished to implement that policy choice, the agency should be required to do so explicitly in the regulation itself, with an explanation of its rationale for preempting tort laws as part of its statement of its reasons for the rule, as well as a definitive statement regarding the scope of preemption. This would not be a new requirement. In fact, in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), this Court indicated that it would be desirable for agencies to articulate the intended preemptive effect of their regulations, noting that, as a practical matter, it is easier for agencies to address such questions when drafting rules than it is for Congress to address these detail issues when drafting a statute. *Id.* at 721.

[7] The airbags illustration used by petitioners and their *amici* is similarly inapt. At no point did NHTSA *forbid* the installation of airbags, and hence it was always physically possible for automobile manufacturers to comply simultaneously with NHTSA requirements and state tort law.

If agencies were to consider regulatory preemption issues as part of individual rulemaking proceedings, manufacturers and the public alike would have an opportunity to discuss preemption matters at the time a standard is issued, rather than having the issue arise through the back door many years later, as the Department of Transportation has sought to do on occasion regarding passive restraints. Thus, in cases of actual impossibility of compliance with both a state-developed tort standard and a federal regulatory standard, preemption may be justified, but only in rare circumstances, and then only if the agency both has been empowered to preempt by Congress and has explicitly made such a choice when promulgating the federal standard.

* * *

In assessing petitioners' theory, it is important to understand that there is one vital fact petitioners conveniently overlook. No matter how perfect the regulatory system may be, it does not and cannot provide compensation for the injuries that regulations do not succeed in preventing. That is the function of the tort system. While standard-setting disciplines the market prospectively, the tort system reviews the reasonableness of a defendant's conduct and asks whether that conduct, if it fails the test of reasonableness, caused the injuries to the plaintiff. One consideration that a trier of fact will certainly take into account is whether the defendant complied with applicable safety standards. Thus, a ruling in favor of respondents will not strip petitioners of the defense that their conduct was reasonable because it was consistent

with applicable safety standards. But, as we have shown, compliance with existing safety standards is not a guarantee that the product does not pose an unreasonable risk. Accordingly, in a real sense, the two systems are complementary, in that they both provide powerful incentives for manufacturers to make their products more safe.

Finally, it bears emphasis that the opportunities for discovery and cross-examination in civil litigation allow for a more fine-tuned process of information gathering that the regulatory process. In a tort action, especially where the victim is seriously injured, there is every incentive to take extensive discovery and ferret out the truth. As we noted, agencies have a number of handicaps in gathering information from industry; limited resources, patchwork statutory authorization, and little, if any, opportunity to examine industry experts. In sharp contrast, in litigation, the plaintiff has full authorization to discover all relevant information, through subpoenas, depositions and document requests. In short, combining the incentive to gather evidence with the power of the court to compel discovery makes the tort system a extraordinarily powerful engine of determining whether products are unreasonably unsafe.

The history of regulation is clear that, but for many civil tort cases, inadequate regulation of specific products would have continued. It is this final aspect of the tort system that underscores how it goes hand in hand with the work of regulatory agencies and why Congress was so eminently reasonable in concluding that there should be no preemption of civil claims for damages based on an existing NHTSA regulation.

CONCLUSION

For the reasons given above and in the brief of respondents, the judgment below should be affirmed.

Respectfully submitted,

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12 December 1994

(16)

Supreme Court, U.S.
FILED
DEC 13 1994
OFFICE OF THE CLERK

No. 94-286

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent injured

plaintiffs in civil actions. State law has traditionally afforded a remedy in tort by which victims may seek fair compensation from wrongdoers.

Increasingly, those who may be defendants in state tort actions seek refuge in the doctrine of federal preemption. In too many instances, immunity from state law is urged by those whose objective is immunity from any accountability, where Congress has not provided for meaningful alternative regulation and remedies. Preemption would result in failure of government in one of the most fundamental obligations to its citizens -- the right to legal recourse for injury.

SUMMARY OF THE ARGUMENT

This is a case about federalism and access to justice. Congressional intent is the touchstone of preemption, and the lower court correctly looked no further than the two express preemption provisions of the National Motor Vehicle Safety Act.

The Vehicle Act does not preempt product liability causes of action. Preemption of any state "safety standard" plainly indicates that Congress intended to preempt only state administrative regulations. Moreover, Congress clearly preserved common law liability in a savings clause.

Petitioners' assertion of "conflict" preemption independent of congressional intent runs counter to established precedent. Moreover, such a rule would invite judges to assume policymaking responsibilities that belong to Congress and would undermine principles of federalism. In addition, the authorities relied upon by Petitioners do not support conflict preemption here, since they involved subjects of federal, rather than traditional state interests, or did not result in leaving claimants wholly without remedy.

Even if Congress had intended to preempt state tort remedies, it lacks the authority to do so. The right to seek legal remedy for wrongful injury is a fundamental right, and affording that remedy is a core function of the states in our federal system. Petitioners would accord Congress the power not only to regulate vehicle safety, but to do so in a manner which dictates to the states their tort rules and requires them to close their courthouse doors to victims who would otherwise be entitled to seek legal recourse. The Tenth Amendment precludes the federal government from "commandeering" state courts in that manner.

ARGUMENT

INTRODUCTION

Like an increasing number of cases that have come to this Court, this "is a case about federalism." *Coleman v. Thompson*, 111 S. Ct. 2547, 2552 (1991).

The issue before this Court is easily stated. The Court's resolution, however, will determine whether the doors to the state courthouse, which have provided access to justice for those seeking remedy for legal wrongs, shall at last be shut against the thousands of persons injured each year by unreasonably dangerous products that are the subject of federal regulation.

In an effort "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. §1381, Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 [herinafter the Vehicle Act]. The Vehicle Act authorizes the Secretary of Transportation to "establish by order appropriate Federal motor vehicle safety standards," 15 U.S.C. §1392(a), defined as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which

is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. §1391(2).

Among these is FMVSS 121, establishing performance requirements for air-brakes. As amended, FMVSS 121 provided that the standard's mandatory stopping distances -- which manufacturers claimed would require installation of antilock devices -- "are not applicable to trucks and trailers." See 49 C.F.R. §571.121.[1]

Congress addressed the preemptive effect of the Vehicle Act in two separate sections:

> **Supremacy of federal standards . . .**
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard.

15 USC § 1392(d).

> **Continuation of common law liability**
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. §1397(k).[2]

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[1]Amicus adopts and respectfully refers the Court to the extensive history of FMVSS 121 set out in the Counterstatement of Facts in Respondent's Brief.

[2]*See also* S. Rep. No. 1301, 89th Cong. 2d Sess. at 14, 1966 U.S.C.C.A.N., at 2720: "Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law."

The consolidated cases before this Court arise out of an injury and a death allegedly due to Petitioners' failure to equip their trucks with antilock devices. The lower court, relying on §1397(c), held that plaintiffs' product liability causes of action under state law were not preempted. *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994).

Two essential characteristics of the statute define the preemption issue for this Court: Federalism and access to justice. First, the subject matter of the Vehicle Act, protection of the health and safety of the public, is one that has been traditionally the responsibility of the states. Second, the statute itself provides no redress or compensation to the victims of dangerous vehicles: Preemption of their state causes of action would leave injured victims entirely without any alternative legal remedy. These factors have been critical in many of this Court's preemption decisions.[3]

This Court has clearly marked a path for lower courts in addressing preemption of state tort law that reflects both appropriate deference to Congress and due regard for the role

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[3]In recent years, commentators have recognized that preemption of state product liability causes of action raise serious federalism issues. *See* Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C.L. Rev. 187 (1993); Philip H. Corboy and Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Adv. 435, 450-52 (1992); Barbara A. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 Buff. L. Rev. 181 (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69 (1988); Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 Const. Commentary 311 (1988); Marc Z. Edell & Cynthia A. Walters, *The Doctrine of Implied Preemption In Products Liability Cases: Federalism in the Balance*, 54 Tenn. L. Rev. 603 (1987).

of the states in the federalist system. The lower court, amicus submits, did not stray from that path.

I. CONGRESS IN THE MOTOR VEHICLE ACT DID NOT PREEMPT STATE LIABILITY FOR INJURY CAUSED BY UNREASONABLY DANGEROUS VEHICLES.

A. The Motor Vehicle Act Does Not Contain a Clear and Unambiguous Statement of Congressional Intent to Preempt State Common Law Remedies.

1. This Court has established a strong presumption against preemption of state tort law which would leave victims without access to justice.

Federal law preempts state law, as this Court has emphasized on numerous occasions and in a broad variety of statutory settings, only where Congress so intends. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987)(congressional intent is the "ultimate touchstone" for preemption, quoting prior cases). The judiciary's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Where Congress makes express provision for the preemptive effect of its handiwork, the inquiry is an "easy one." *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). Indeed,

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and where that provision provides a reliable indicium of congressional intent with respect to state authority ... there is no need to infer congressional intent to pre-empt from the substantive provisions of the legislation.

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992).

In reading the statute, due regard for federalism requires courts to "start with the assumption that the historic police powers of the states were not to be superseded by [a] federal act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Corp.*, 331 U.S. 218, 230 (1947). *See also Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963)(preemption of state law must be based on an "unambiguous congressional mandate to that effect"). "This assumption provides assurance that 'the federal-state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

This Court instructed that this presumption be especially strong in cases involving traditional state interests and access to justice. *See, e.g., English v. General Electric Co.*, 110 S. Ct. 2270, 2277 (1990)(even in the highly regulated field of nuclear facilities, the Court found no clear and manifest intent on the part of Congress . . . to preempt all state tort laws that *traditionally* have been available); *FMC Corp. v. Holliday*, 111 S. Ct. 403, 410 (1990); *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1156 n.13 (1988); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-44 (1963).

Where preemption would eliminate access to justice, the Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) stated:

> This silence (of congress) takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without

comment, remove all means of judicial recourse for those injured by illegal conduct.

464 U.S. at 251. Justice Blackmun, dissenting in *Silkwood*, was equally emphatic on this point: "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter to be left to the States." 464 U.S. at 264 n.7. Hence, this Court has refused to find preemption of state law remedies where federal law provided no alternative redress. *See United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 663-64 (1954).

2. Express preemption of any state "safety standard" does not clearly indicate congressional intent to eliminate state product liability law.

In this case, the Court "need only identify the domain expressly preempted" by the statutory language and narrowly construe its terms "in light of the presumption against the preemption of state police power regulations." *Cipollone*, 112 S. Ct. at 2618.

At issue is whether Congress intended by preempting "any safety standard"[4] to include product liability lawsuits. The meaning of "safety standard" in the text of §1392(d) is greatly clarified by Congress's parallel usage of the identical phrase earlier in the same sentence to refer to "Federal motor vehicle safety standard." The plain reading of this provision is that Congress intended to preempt state administrative regulations on the state level. *See, e.g., Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987)(In construing a preemption clause, "Congress is presumed to use

[4]Petitioner insists upon the single the word, "standard," which may refer to common-law duties. Pet. Br. at 30. However, the cited authorities refer to "standards" in the context of standards of care, or reasonable person standard. None appears to use the more restrictive term "safety standard" used by Congress in §1392(d).

words in their ordinary sense unless it expressly indicates the contrary. . . . The usual understanding of regulations by rule, regulation, order, or *standard* will be regulation by administrative agency.")(Emphasis added.)

If Congress had intended to include tort liability within the preemptive scope of the provision, it would likely have employed a different term, one that more clearly includes common law liability suits. Indeed, "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires." *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989).[5]

It is not enough for Petitioner to argue that product liability lawsuits may have a regulatory effect. Pet. Br. at 33. Recognizing the weakness of textual support for their position, Petitioners attempt to construct a presumption *in favor* of preemption. Pet Br. at 19-22. Nevertheless, this Court has recently reaffirmed its presumption that "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that is the clear and manifest purpose of Congress." *Cipollone*, 112 S. Ct. at 2617. Amicus submits that "safety standard" simply does not clearly and unambiguously denote tort liability actions.

This "plain statement doctrine" is more that a device of statutory construction. It is essential to the preservation of the proper federal-state balance. In *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), Justice O'Connor described the plain

[5]*See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §1715z-17(d), -18(e) (Supp. V 1987)(preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. §301(a)(1982)(preempting rights "under the common law or statutes of any State"); Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a), (c)(1)(1982)(preempting all state "law, decision, rules, regulations, or other State action having the effect of law").

statement doctrine: "[I]f Congress intends to alter the usual constitutional balance between States and the Federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 2401. *See also Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2308 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *Taffet v. Southern Co.*, 930 F.2d 847, 851 (11th Cir. 1991)("A federal court should not apply a federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power.").

In a thoughtful and scholarly monograph, Judge Kenneth Starr has noted with approval "a growing culture of clarity in Supreme Court jurisprudence" in which the requirement of a clear statement of congressional intent to preempt fosters not only a healthy federalism, but also accountability on the part of Congress. Kenneth Starr, et al., The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association 40 & 50-55 (1991) [hereinafter "Law of Preemption"].

3. Section 1397(k) expressly preserves common law liability.

Indeed, in the single provision of the Vehicle Act where Congress did make a clear and unambiguous reference to common law remedies, it did so to preserve them.

The meaning of this savings clause -- or in Justice Scalia's phrase, "antipre-emption provision," *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 295 (1987)(Scalia, J., concurring) -- is plain. As Arizona Justice Chief Feldman recently stated, "We find these words a reasonably clear congressional mandate. The inescapable conclusion is that Congress considered the preemption issue, addressed it in the text of the legislation, and rejected

preemption of state law tort claims like the one in this case." *Hernandez-Gomez v. Leonardo*, 1994 WL 593202 (Ariz., Nov. 1, 1994).

B. Express Preemption of State Regulatory "Safety Standards" Does Not Preempt State Product Liability Actions.

1. The indirect incentive for safety resulting from tort liability is fundamentally different from direct administrative safety regulation.

Key to petitioner's preemption analysis is the notion that administrative standards and common law tort liability are substantially equivalent methods of regulating unsafe conduct. For this reason, the argument goes, express preemption of state "standards," "regulations," "requirements," or similarly general terms should be construed as including tort liability as well as positive enactments. Pet. Br. at 30-33.

The fact is that these two tools available to society to enhance safety are dramatically different. And those differences are critical to preemption analysis. The essential difference is that tort law has as its goal the compensation of victims of wrongful conduct. It is therefore inherently retrospective. The jury determines whether past conduct was unreasonably dangerous or lacking in due care; it does not prescribe a safe design or proper conduct. The only "requirement" imposed upon the defendant is payment for the damage caused. *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1540-41 (D.C. Cir. 1984); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1138 (E.D.N.Y. 1992)(noting that *Ferebee* "remains a leading case").

There is no prospective legal effect to a tort verdict. A subsequent plaintiff injured by the same product may not rely

on the prior verdict to establish liability; nor does a defense verdict in one case guarantee that the manufacturer will not be found liable in another case. The damage awards are measured by the injury suffered by the plaintiff, not by the amount necessary to force the defendant to alter its future conduct. Defendants can and do make the decision to pay damages without altering their products. In short, a liability verdict establishes no mandatory "safety standard."

The distinction between administrative regulation and the imposition of common law liability is clearly drawn and widely recognized, particularly in the field of product safety. *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357 (1984). Reliance on regulation alone may well run counter to the very goals of the administrative scheme. *See* Frank J. Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 30 Am. U. L. Rev. 673, 687 (1981)("Arguably, this type of legislation will discourage manufacturers from developing safer products, because it encourages manufacturers to lobby for weaker regulations rather than developing safer products.").

It is true that tort liability may exert an effect on manufacturer conduct. The expense of compensating victims of unsafe products gives an advantage in the marketplace to safer competitors and so provides an incentive for the manufacturer to invest in safety. This indirect impact is far removed from direct regulatory requirements imposed by a governmental agency.

As explained by Dean Calabresi, society seeks to prevent accidental injury through both general deterrence and specific deterrence. Guido Calabresi, The Costs of Accidents 68-129 (1970). Under general deterrence, decisions about accident avoidance measures are left to market processes. Strict liability merely ensures that the market price of a product reflects the true cost, including the costs arising from

unreasonable dangers in the product. "Thus, under a general deterrence regime, manufacturers, not government officials, make decisions about product safety." Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L. Rev. 897, 927 (1988). In contrast, specific deterrence mandates a particular choice determined by the legislature or an administrative agency. It is a raw exercise of state power that will reflect the political agenda of the regulator or other, noneconomic community values. *Id.*

This Court has recognized that Congress may permit indirect impact of tort liability while preempting direct regulation:

> We recognize that a claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. . . . Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.
>
> This result is strongly suggested by the decision in *Silkwood v. Kerr-McGee Corp.*

English v. General Electric Co., 110 S. Ct. 2270, 2278 (1990).

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that *incidental regulatory*

pressure is acceptable, whereas direct regulatory authority is not.

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988)(emphasis added).

As Justice Blackmun later described the import of these decisions, "The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory impact of the common law from positive enactments such as statutes and administrative regulations." *Cipollone*, *supra*, at 112 S. Ct. at 2628 (Blackmun, J., concurring in part, dissenting in part).

2. The statement in Garmon on the regulatory effect of tort liability does not transform product liability into a safety standard.

Petitioner relies on a passage in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959):

> Such regulation can be as effectively exerted through an award of damages as though some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Amicus suggests that this passage, quoted in *Cipollone*, 112 S. Ct. at 2620 without qualification or context, invites greater reliance on *Garmon* than is warranted.

In *Garmon*, an employer filed suit in California state court against a labor union that had picketed plaintiff's lumber business. The court assessed tort damages under state law for unfair labor practices. The Supreme Court reversed, holding that the claim should have been filed first with the National Labor Relations Board. Justice Frankfurter, writing for the majority, announced what has become known as the *Garmon*

rule: "When activity is arguably subject to section 7 [concerted activities] or section 8 [unfair labor practices] of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id.* at 245.

The Congressional scheme did not simply preempt state regulation of certain labor activities; it completely deprived the courts -- state and federal -- of jurisdiction in favor of the NLRB, the "special tribunal" that Congress set up for this purpose. *Id.* at 242.

As this Court later explained, *Garmon* was chiefly concerned with establishing the remedial scheme provided by the National Labor Relations board in place of state remedies "by ensuring that the primary responsibility for interpreting and applying this body of law remained with the NLRB. . . based on the primary jurisdiction rationale." *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984). As one district court has stated

> *Garmon* is better understood as [concerned] with the primary jurisdiction of the NLRB and the exclusive application of its remedial scheme. The Court's discussion of pre-emption of state common law claims must be read with that in mind.

Wood v. General Motors Corp., 673 F. Supp. 1108, 1118 n.14 (D. Mass. 1987), rev'd, 865 F.2d 395 (1st Cir. 1988).

Even if *Garmon* is viewed as a preemption case, the passage merely restates the settled proposition that where the Congress intended to occupy the field completely, state regulation -- direct or indirect -- is ousted. And even in this context of field preemption, the Court carefully conditioned its ouster of state law on the assurance that access to justice be assured through alternative federal remedies. The majority opinion emphasized the fact that NLRA established a set of

procedures and remedies in place of the state law remedies displaced by the Act. 359 U.S. at 243. The concurring justices cautioned that, where Congress has not provided a remedy for tortious conduct, "there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *Id.* at 252 (Harlan, J., concurring), quoting *United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 665 (1954).

In cases where Congress has neither occupied the field nor provided alternative remedies, *Garmon* has little application.

II. THE VEHICLE ACT DOES NOT OUST PRODUCT LIABILITY THROUGH "CONFLICT" PREEMPTION.

A. Where Congress Has Made Express Provision for the Preemptive Scope of a Statute, Courts May Not Disregard Congressional Intent to Imply Broader Preemption.

Part I of Petitioner's Brief presents this Court with a striking manifesto for judicial power. Petitioner asserts that "conflict" preemption "stands quite apart from any congressional intent to displace state authority." Pet. Br. at 18. Indeed, a court may hold state law to be preempted despite "a broad savings clause that *explicitly* and sweepingly preserves state authority." Pet. Br. at 23. All that is required is judicial determination that the state law conflicts with the federal law, or policy. This, Petitioners assert, "follows from the Supremacy Clause's mandate regarding the primacy of federal regulatory policy (without separate proof of congressional intent to displace state authority)." Pet. Br. at 26.

This Court has steadfastly insisted that congressional intent is the touchstone of preemption. Moreover, disregard

of even the express intent of Congress poses grave threats to federalism. This Court in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), held that the integrity and sovereignty of the states is safeguarded primarily by their representation in Congress. As Justice O'Connor has stated:

> By declining to infer preemption in the face of congressional ambiguity, the Court is not interposing a judicial barrier to Congress' will in order to protect state sovereignty -- an interposition that would violate *Garcia* -- but is instead furthering the spirit of *Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end.
>
> * * *
>
> Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.

Gregory v. Ashcroft, 111 S. Ct. at 2403.

Judge Starr has pointed out the dangers of this course urged by Petitioners:

> When courts preempt state laws without explicit congressional guidance, unelected and unaccountable officials substitute their preferences for those of the citizens of local communities. Unguided preemption thus erodes our national commitment to the process of self-governance . . . When judges preempt state laws in the abence of explicit congressional guidance, they in effect assume a legislative role without accepting

> legislative responsibility. [In addition] the overarching guarantee of "Our Federalism" is defeated.

Starr, Law of Preemption at 48-49.

This Court has warned: "As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). In short, "courts should not assume the role which our system assigned to Congress." *Pacific Gas & Elec. Co. v. Energy Resources Comm'n.*, 461 U.S. 190, 223 (1983).

B. State product liability law is not in conflict with FMVSS 211.

1. It is not impossible for manufacturers to comply with both FMVSS 211 and state liability rules.

There is significantly less to Petitioner's conflict preemption argument than initially meets the eye. The fact is that there is no conflict between the FMVSS 121 and state tort law. FMVSS 121 merely renders the prescribed stopping distances inapplicable to trucks and trailers. As a result, manufacturers may install antilock devices, or they may choose not to. It is not impossible to comply with the federal standard while remaining subject to state product liability actions. This is essentially the same choice they had before the standard was written. Petitioner would accord preemptive effect, not to the standard, but to the decision not to impose a standard. At bottom, Petitioners ask for field preemption.[6]

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[6]It is ironic that Petitioner seeks to confer supemacy status on federal regulatory policy. NHTSA policy, as originally reflected in FMVSS 211, was to require antilock brakes. It withdrew that requirement only when ordered to do so by the Court in *Paccar Inc. v. NHTSA*, 573 F.2d 632 (9th Cir. 1978). See Resp. Br. at Counterstatement of Facts.

This Court has rejected the contention that tort law necessarily "conflicts with the federal remedial scheme." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). To the contrary, in that case:

> Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.

Id. at 258.

Justice Blackmun dissented on the issue of punitive damages, but agreed that:

> Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. . . . Compensatory damages therefore *complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme*.

Id. at 264 (Blackmun, J., dissenting)(emphasis added).

Courts have also harmonized product liability with federal regulatory standards by viewing the latter as "a floor, not a ceiling." *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984); *Rucker v. Norfolk & Western R.R.*, 396 N.E.2d 534, 537 (Ill. 1979); *Stevens v. Parke, Davis & Co.*, 507 P.2d 653, 661 (Cal. 1973); *Raymond v. Riegel Textile Corp*, 484 F.2d 1025 (1st Cir. 1973); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968)("It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability.").

2. State product liability does not conflict with the federal "option" to use antilock brakes.

Petitioners seek to transform FMVSS 121 into a positive guarantee of the option not to install antilock devices. Pet. Br. at 36-37. In fact, NHTSA simply decided not to require them.

In this respect, the issue is similar to that presented in *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). That case involved an asserted conflict preemption between a state statute which required employers to provide a benefit to pregnant employees, and the federal Pregnancy Disability Act, in which Congress declined to require special benefits. Justice Marshall suggested it would be anomalous to read a federal statute that does not require the states to be more generous as prohibiting them from doing so. Significantly, he reconciled the statutes by concluding that the federal act represented a "floor, not a ceiling."

Petitioners insist that "agency *failure* to regulate may have preemptive force." Pet. Br. at 32. That principle applies only where Congress has occupied the field. Otherwise, as this Court has stated, "unenacted approvals, beliefs and desires are not laws" under the Supremacy Clause. *Puerto Rico Dept. of Consumer Affairs v. Ilsa Petroleum Corp*, 485 U.S. 495, 501 (1988). In this case, Petitioners truly seek to "leave behind a preemptive grin without a regulatory cat." *Id.* at 504.

C. Product Liability Does Not "Stand As An Obstacle" To The Purposes And Objectives of the Vehicle Act.

To establish conflict preemption, Petitioners rely on a passage drawn from *Hines v. Davidowitz*, 312 U.S. 52 (1941)(state law is preempted if it "stands as an obstacle to

the accomplishment and execution of the full purposes and objectives of Congress"). Pet. Br. at 18. Similarly, Petitioners look to *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987) for the proposition that not even a savings clause preserves a state law "that would subvert a federal statutory or regulatory scheme." Pet. Br. at 23.

Petitioner ignores that fact that federalism and access to justice are distinguishing factors in those cases that render them inapposite here.

In *Hines*, the Court preempted an Alien Registration Act adopted by Pennsylvania on the basis of field preemption. Significantly, Justice Black clearly announced that the basis of preemption was that

> this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.

312 U.S. at 67-68. (Emphasis added).

This distinction was underscored in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), which involved local regulation of blood plasma. Justice Marshall, for the Court, noted :

> [I]n the seminal case of *Hines v. Davidowitz*, [312 U.S. 52 (1941)], the Court inferred an intent to preempt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution,' . . . and the regulation of that field is intimately blended and intertwined with responsibilities of national government. Needless to say, those factors are absent here. Rather, as we have

stated, the regulation of health and safety matters is primarily and historically, a matter of local concern.

Id. at 719.

Freightliner's reliance on *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), is similarly misplaced. *Ouellette*, despite its discussion of preemption, is not a preemption case at all, but a conflict of law case.[7] To the extent that it has any relevance, *Ouellette* is authority *against* Petitioner's position. First, the Court had occasion to look to the policies and purposes of the statute only because "the Act itself does not speak directly to the issue." *Id.* at 493. Second, *Ouellette*, like *Hines*, involved a subject matter -- interstate water pollution -- where national interest predominates. *Id.* at 492. Finally the *Ouellette* Court conditioned its holding on the fact that the result "does not leave respondents without a remedy." *Id.* at 497.

III. CONGRESS LACKS THE AUTHORITY TO PREEMPT THE COMMON LAW RIGHT OF ACCESS TO JUSTICE FOR REDRESS OF WRONGFUL INJURY.

Even if Congress intended to preempt state tort law, this Court's inquiry is not at an end. Congress may not act beyond the authority granted to it in the Constitution. Hence Congress may preempt state law only "when acting within constitutional limits." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). Regulation of vehicle safety is unquestionably within the authority of Congress. However, Amicus submits, regulation in a manner

[7] In *Ouellette*, landowners brought a state law nuisance action against a paper mill, alleging pollution of a resort lake. At issue was not whether the Federal Clean Water Act preempts state tort actions; the Act expressly preserved those remedies. Rather, the issue was whether to apply the law of the landowners' state or the state of the source of the pollution. The Court held the Act required the latter. 479 U.S. at 497.

which purports to eliminate the state law right to a remedy for tortious injury is beyond the constitutional limits.

A. Affording the Right to Seek Redress for Injury Is a Core Function of the States.

The common-law right to seek redress in the courts for wrongful injury holds a special place in our civil justice system. Common-law rights were not created by legislatures and are not a matter of legislative grace. Indeed, they preceded even the Constitution. Lord Coke traced this right to the Magna Carta.[8]

One of this Court's earliest pronouncements declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This right of access to justice is so fundamental that this Court has located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

This Court has not departed from these principles. Justice Powell observed that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Ingraham v. Wright*, 430 U.S. 651, 674 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In *Ingraham*, which addressed the corporal punishment of school children,

[8] Every Subject may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without denial, and speedily without delay.

Coke, Second Institute 55-56 (4th ed. 1671).

the Court indicated that lack of notice or hearing might well have violated due process but for the fact that aggrieved parties had access to the common-law tort remedy for excessive punishment. *Id.* at 674. This result is consistent "with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law." *Id.* at 679 n.47.

The right to a remedy is expressly guaranteed by thirty-seven state constitutions. Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 615 n.218 (1981); Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202 (1964).

The importance of this right is greatly magnified by the fact that access to justice is intimately bound up with the right to trial by jury. The former colonists valued the right to trial by jury in civil cases so highly that they incorporated it into the basic charter of government.[9] Indeed, it was only after a commitment was made to include this right in a bill of rights that the Constitution was ratified at all. *See* Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486

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9 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend VII.

(1953).[10] "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979)(Rehnquist, C.J., dissenting), and the right to trial by jury is guaranteed by virtually every state constitution.

The continued vitality of these state constitutional guarantees is reflected in the decisions of state supreme courts striking down limitations on damages in tort actions as violative of those rights. *See, e.g., Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala 1991)(right to jury trial); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987) (right to jury trial and right of access to courts); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988) (right to jury trial and right to remedy); *Lucas v. United States*, 757 S.W.2d 686 (Tex. 1988) (open courts guarantee); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989)(right to jury trial).

B. The Tenth Amendment Withholds From Congress the Authority to Close State Courts to Those Seeking Redress for Wrongful Injury.

Given the fundamental nature of the right to seek legal redress for injury and the importance of the function of the States in affording that right, it flows from the structure of our federal system that the authority of the federal

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10 Describing the right to trial by jury as "a great constitutional right," the Court stated that "it is only in exceptional cases and for specific causes that a party may be deprived of it." Grand Chute v. Winegar, 82 U.S. 373, 375 (1872). *See also* Bailey v. Central Vermont Ry., 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence."); Lyon v. Mutual Benefit Assoc., 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded.").

government to curtail that right is limited. One constitutional limit on federal preemptive action is the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.[11]

The applicability of this provision is made apparent by Petitioners' view of the operation of the Vehicle Act:

> But in cases of conflict preemption, as here, federal law *invalidates* the standard of conduct that defines the alleged "illegality," leaving plaintiff with a complaint seeking recovery for conduct that is not tortious.

Pet. Br. at 24.

In other words, Petitioners would confer upon Congress the authority to change state tort law. Or more precisely, the authority to compel state courts to enforce the tort rule devised by Congress.

Such authority is clearly beyond the authority of Congress, as this Court recognized in the landmark decision of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938):

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution

[11]This provision should be read together with the Ninth Amendment:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const., amend. IX.

> purports to declare such a power upon the federal courts.

Id. at 78. Justice Brandeis indicated the Tenth Amendment boundary by noting that in purporting to declare common law, "this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." *Id.* at 80. *See also Griffin v. Breckenridge*, 403 U.S. 88, 102, 104 (1971)(dicta indicate that Congress may not have the power under the commerce clause or thirteenth and fourteenth amendments to federalize completely such traditional areas of common law as the law of torts).

More recently, this Court addressed the constitutionality of the Price-Anderson Act, which imposed a cap on tort damages recoverable due to a nuclear plant accident. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86-87, 91-93 (1978). The Court suggested that abolition of the common law right to a tort remedy would violate due process. The Court upheld the statute because it provided a "panoply of remedies and guarantees," including imposition of a form of strict liability and an expedited recovery scheme. *Id.* at 86-88 and 91-93. As Justice Marshall later remarked:

> [O]ur cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

PruneYard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980)(Marshall, J., concurring).

The Court gave substantive content to the Tenth Amendment in *National League of Cities v. Usery*, 426 U.S. 833 (1976), holding that Congress could not impose the federal minimum wage requirement on the states as

employers. The decision advanced the notion that certain essential functions of a State are so "integral" to statehood that they may not be supplanted by federal law.

> Congressional enactments which may be fully within the grant of legislative authority contained in the commerce clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment, or the Due Process Clause of the Fifth Amendment. . . . This court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce . . . The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function in a federal system.

Id. at 854-55.

The Court overruled *National League of Cities* a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*. 469 U.S. 528 (1985). The *Garcia* Court did not dismantle the system of federalism, however. Rather the majority found that the task of defining "traditional government functions" of the States was unworkable. More importantly, the majority concluded that the States do not need substantive protection under the Tenth Amendment; they can fully protect their interests by virtue of their representation in Congress. *Garcia* reasoned that the States "are more properly protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

This Court has consistently emphasized the importance of federalism, not as the mere absence of federal interference, but as a positive value of self-government.

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenious society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 111 S. Ct. at 2399 (1991).

More significantly, this Court has recognized that the "procedural safeguards" relied upon in *Garcia* are not sufficient in every instance of federal interference with state functions. *New York v. United States*, 112 S. Ct. 2408 (1992) involved the Low-Level Radioactive Waste Policy Amendments Act of 1985, which provided monetary incentives for states to develop waste sites that comply with federal goals, and commanded that where there is no appropriate disposal site, states must take title to the waste.

The Court stated, "The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id.* at 2418. The Court upheld the incentives, but declared that the federal government may not "commandeer the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 2420.[12]

> The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize

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[12]Two district courts, following *New York*, have recognized limits on congressional authority to "commandeer" state officials to enforce the Brady Act.. *Pritz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994).

> Congress to regulate state governments' regulation of interstate commerce.

Id. at 2423.

In essence, this is what Petitioners seek: a congressional command to the states to close the doors of their courts to injured victims of unreasonably dangerous vehicles. As Judge Starr points out, "Federalism Counts." Kenneth Starr, The Law of Preemption at 40. And he adds "The Tenth Amendment most directly recognizes the states' crucial role in the governance of our federal system." *Id.* at 43.

CONCLUSION

For the foregoing reasons, Amicus urges this Court affirm the judgment of the court of appeals.

Respectfully submitted,

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December 13, 1994

Supreme Court, U.S.
FILED
DEC 12 1994
OFFICE OF THE CLERK

(17)

No. 94-286

In The
Supreme Court of the United States

October Term, 1994

FREIGHTLINER CORPORATION,
Petitioner,

vs.

BEN MYRICK AND EMILY MYRICK,
Respondents,

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,

vs.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF THE INSTITUTE FOR INJURY REDUCTION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST

The Institute for Injury Reduction (IIR) is a non-profit national organization. Its members include attorneys and non-attorneys, many of whom have been involved in litigation activities because of the design and marketing of hazardous products IIR was formed in an effort to provide a continuing public service to identify defective products, advise the government and the public of the existence of these products, and take appropriate steps to eliminate these products from our marketplace. The Institute's members include individuals injured, or family members who have lost loved ones because motor vehicle manufacturers have not produced products with the State of the Art in safety performance. The Institute's members have a vital interest in the effect this decision may have on their members because motor vehicle manufacturers continue to produce vehicles which only meet the bare minimum federal motor vehicle safety standards, thereby resulting in the sale of vehicles which are not reasonably safe for all foreseeable accidents -- many of which are not even tested to the minimum standards established by the federal government. This situation allows motor vehicle manufacturers to ignore their common law responsibility to build and sell crashworthy vehicles, and it has resulted in injuries and deaths to thousands of Americans who should not have otherwise been injured or killed.[1]

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See, Sup. Ct. R. 37.

II. SUMMARY OF ARGUMENT

In 1966, the United States Congress passed the National Traffic Safety Act (referenced as the Safety Act), in an effort to establish regulations for vehicle performance which would provide basic and minimum safety for vehicles sold in this country. Then, the Congress authorized the establishment of a government agency (to develop and promulgate these regulations) which became known as the National Highway Traffic Safety Administration (NHTSA). The legislators who passed the Safety Act in 1966 were quite aware of then existing regulations and standards which many of the States had promulgated, and which required automobile manufacturers to only sell cars in their respective States if these vehicles were equipped with certain devices, such as front seat seatbelts. Congress was asked by some facets of the safety community advocates alike to pass legislation which would have the effect of eliminating diverse vehicle regulations, so that only one governmental agency would control the development and promulgation of standards which vehicle companies would be obliged to meet in order to market their products in this country. These standards were defined as "minimum standard[s] for motor vehicle performance."[2]

As the National Transportation Safety Board reported in 1970[3]:

"The imposition of Federal Motor Vehicle

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[2] 15 U.S.C. 1391(2) (1966, 1988 & Supp. III 1991).

[3] *Special Study, The Roles of General Services Administration and Department of Transportation in Motor Vehicle Safety Standards*, Report No. NTSB HSS 70 1 (June 3, 1970), see page 4.

> Safety Standards for certain characteristics of vehicle safety insures that a particular level of safety will be universally applied, but it does not insure that the highest level of safety will be the standard, nor does it insure that the highest practical level of safety will be available to purchasers in the market."

At the same time Congress was writing this legislation, courts around the country and legal scholars were applying common law principles to the issue of a motor vehicle manufacturers' duty to build vehicles which are crashworthy. Larsen v. General Motors Corporation, 397 F.2d 495 (8th Cir. 1968). See generally, Hoenig, Resolution of "Crashworthiness" Design Claims, 55 St. John's L. Rev. 633 (1981).

As a result of the contemporaneous application of the common law to motor vehicle design safety, and the promulgation of State safety legislation, the Safety Act addressed both issues. The Safety Act and its legislative history indicate that Congress did not want dual state and federal systems of administrative regulation. This was made quite clear by inclusion of a preemption provision; yet, Congress also specifically provided that the Safety Act would not undermine the common law:

> "While the federal statute under which these regulations were passed preempts inconsistent state standards, 15 U.S.C. 1392(d), compliance with the federal regulations does not exempt any person from any liability under common law," 15 U.S.C. 1397(c)." Dorsey v. Honda Motor Company Ltd, 655 F. 2d 650, 654 (5th Cir. 1981).

The preemption section of the Safety Act prohibits any State or political sub-division from establishing any safety standard dissimilar to published federal standards. Virtually every federal and state appellate court has concluded that the language and intent of the preemption section cannot be read to extend to common law damage claims. Unlike the language used by Congress in other legislation, here Congress expressed its intent to effect only the conduct of States and political subdivisions, rather than juries. Myrick v. Freightliner Corporation, 13 F.2d 1516 (11th Cir. 1994); Taylor v. General Motors Corporation, 875 F.2d 816 (11th Cir. 1989); Hernandez-Gomez v. Leonardo, et al., 1994 WL 593202 (Az. Nov. 1, 1994); Gingold v. Audi-NSU-Auto Union. A.G., 567 A.2d 312 (Pa. Super. 1989) (rehearing denied).

In this instance, it is not just that Congress' statement of preemption does not mention common law, but rather that Congress specifically identified the State activity which it intended to preempt, i.e., activities of State and political subdivisions. And, Congress also expressed its intent to preserve the common law by stating that compliance with federal safety standards does not exempt any person from any liability under common law. 15 U.S.C. §1397(c) (1966).

When the Eleventh Circuit revisited the question of federal preemption in this instance, it did so with a clearly defined path of analysis, which this Court provided in Cipollone vs. Liggett Group, Inc., 112 S.Ct. 2608 (1993). We disagree with the arguments of the Petitioner and its Amici, and submit that the Myrick Court correctly applied the principles of federal preemption to the Safety Act. The issue resolved below was not whether the court should address the existence of a "conflict" between state and federal law, but whether Congress provided for preemption

of the common law claims set forth by the plaintiff. It is the latter issue which was correctly decided below and should now be affirmed.

The Myrick Court correctly observed that there is no reason to study the question of implied preemption because of the obvious and expressed intention of Congress in disavowing any intent to preempt common law claims. The Myrick Court properly found that the "conflict analysis" of federal preemption should not be employed because it is only applicable when a Court is obliged to resort to principles of implied preemption. As this Court stated quite emphatically, when Congress has considered the issue of preemption, one should discern the scope of preemption from the precise provisions within the legislation. Here, the host of decisional law, which preceded Myrick and applied implied preemption/conflict analysis to the issue at hand, was obviously in error. Representing a growing minority, the Arizona Supreme Court succinctly summarized how courts including the Eleventh Circuit Court of Appeals have viewed the teachings of Cipollone,[4] and addressed the defense of preemption to common law claims:

> "In the wake of Cipollone, courts have narrowed their evaluation of a statute's preemptive reach. Almost all of the federal circuits have addressed federal preemption since Cipollone and now consider expression of preemption in a statute's text the 'reliable indicium of congressional intent,' no longer divining implied preemption."

While Myrick did not address the same federal motor vehicle standard which the Arizona Supreme Court

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[4] Hernandez-Gomez v. Leonardo, supra. at 14-15.

considered (FMVSS 208), it is quite apparent that the rationale followed in Myrick has application to the question of an injured party's right to bring a tort action against a manufacturer under a whole host of circumstances where the manufacturer may argue that compliance with an applicable safety regulation is tantamount to immunity from suit. It is this concern, which has prompted this Amicus to file this brief urging the Court to affirm the decision of the court of appeals; and, we ask the Court to establish for all litigants the clear proposition that because Congress never intended to preempt any common law remedy for defective design and manufacture, courts cannot impose their will upon injured consumers and preempt these claims -- despite a manufacturer's satisfaction of the minimum safety regulations.

Contrary to the protestations of the Amici for the Petitioner, including specifically the American Automobile Manufacturers Association, and its international counterpart, the decisional law which has preempted defective seat belt claims and "no airbag" claims is in error. There is nothing unique about a federal minimum safety standard providing manufacturers with alternative means to satisfy a very basic level of crash safety; allowing injured victims of non-crashworthy vehicles an opportunity to prove to juries that their injuries are attributable to a manufacturer's failure to go beyond the bear minimum in crash safety does not conflict with the Safety Act, and it can only **promote** improvements in design protection. The issue of design defect in relation to the question of compliance with a standard such as FMVSS 208 is not whether "[e]very person injured in every accident could claim that a different FMVSS 208 option should have been chosen in her car, and seek to punish the manufacturer for choosing an option federal law found essential to meeting the safety goal" (Brief of Amici Automotive Manufacturers, p. 5), but rather it is whether Congress expressly intended to shield these

manufacturers from tort liability when they do no more for safety than the bear minimum required by NHTSA. We think the answer to this question is quite clear: there is no immunity from common law liability for mere compliance with minimum safety regulations.

III. ARGUMENT

A. Background

Nearly thirty years ago, the publication of Ralph Nader's Unsafe at Any Speed (1965) helped spur two major developments in the law. First, it prompted attorneys and the courts to give increased attention and recognition to a relatively recent engineering development--the design of vehicles to be crashworthy. Second, it prompted Congress to give increased attention to the need for federal motor vehicle safety legislation and, ultimately, to pass the Safety Act of 1966. In the intervening years, as motor vehicle design defect litigation has grown, the manufacturers have consistently argued to courts that when their vehicles have complied with applicable federal motor vehicle safety standards, they cannot be held liable for failing to do more. And, equally consistently, courts have rejected this argument. They have uniformly stated that Congress meant what it said in 15 U.S.C. §1397(c): "[c]ompliance with any federal motor vehicle safety standard does not exempt any person from any liability under common law". Larsen v. General Motors Corporation, supra; Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992).

The application of the common law to the field of automotive safety has, therefore, borne actions at common law for the deaths and injuries that the motor vehicle industry knew would result from their longstanding refusal to install safety devices, such as air bag systems. See,

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 35, 50 (1980) ("[T]he automobile industry waged the regulatory equivalent of war against the airbag". . . [even though]". . . passive restraint could prevent approximately 12,000 deaths and 100,000 serious injuries annually"). Yet, during the past several years, the manufacturers have had success in convincing many courts that they should still not be held accountable for failing to install these safety systems in motor vehicles. Strangely, until this Court's decision in Cipollone, many courts "bought into" the argument of preemption advanced by the manufacturers. Only a few stalwart judicial defenders of Congress' obvious intent in the passage of the Safety Act were brave enough to "say no" to the rationale employed by many courts to preempt claims which Congress never intended to preempt. Gingold v. Audi-NSU-Auto Union, A.G., 567 A.2d 312 (Pa. Super. 1989); Loulos v. Dick Smith Ford, 882 S.W. 2d 149 (Mo. Ct. App. 1994); Hernandez-Gomez v. Leonardo, supra. In the application of preemption, the four Federal Circuits to address the manufacturers' preemption argument in "no-airbag" cases prior to Cipollone held that 15 U.S.C. §§1392(d) and 1397(c) precluded a finding of "express" preemption, but they each went on to hold that the manufacturers were "impliedly" exempted from liability under common law solely because they complied with Federal Motor Vehicle Safety Standard 208--which permitted, but did not require, them to install passive restraints in motor vehicles. Taylor v. General Motors Corp., 875 F. 2d 816 (11th Cir. 1989), cert. den., 110 S. Ct. 1781 (1990), rev'd in part, Myrick, supra; Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), cert. den., 110 S. Ct. 1781 (1990); Pokorny v. Ford Motor Company, 902 F.2d 1116 (3rd Cir. 1992); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), cert. den., 110 S. Ct. 1781 (1990). It was at this juncture in the "evolution" of the preemption

analysis of the Safety Act that this Court issued its opinion in Cipollone, which then prompted a reevaluation of the application of "implied preemption" to common law actions predicated upon the failure to design a crashworthy vehicle despite compliance with federal minimum safety standards.

B. The Safety Act Says There is No Preemption.

First, there is no explicit language in the Act which expresses an intention to preempt state common law, but there is a clear and explicit statement that nothing in this legislation is intended to preempt the plaintiff's claim. Second, Congress has never created a "comprehensive federal regulatory scheme" which establishes that regulation of all facets of the automotive industry is a matter particularly within the federal system. Third, and of equal importance to this case, there is clearly no conflict which arises where "compliance with both federal and state regulations is a physical impossibility", or where permitting a common law cause of action against an automotive manufacturer of the nature filed by plaintiff will stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". As to this latter point, it is the clear and stated purpose of Congress in enacting this legislation to protect consumers, rather than manufacturers. Further, the regulations in question merely set minimum performance standards; they do not establish a design criteria, nor provide for the construction of a non-defective vehicle.

On September 9, 1966, the United States Congress enacted the Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq. The declared purpose of the Act was to establish safety standards

> ". . . to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. 15 U.S.C. §1381.[5]

The Act defines "motor vehicle safety standards" as

> ". . . a minimum standard for motor vehicle performance or motor vehicle equipment performance . . . 15 U.S.C. §1391(2).

In an effort to establish minimum standards applicable to all vehicles, the Act provides that neither State government's nor political subdivisions of a State may establish safety standards (i.e., regulations) which are dissimilar to the federal standards. 15 U.S.C. §1392(d) (amended 1982).[6]

Congress decided that States (defined in "the Act" as

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[5] The Senate Report on the Act sadly observed that there was disturbing evidence of the automobile industry's "chronic subordination of safety design to promotional styling, and that these manufacturers have adopted the attitude that safety doesn't sell". See 2 U.S. Cong. & Admin. News. 66-55, p. 2710.

[6] Since the Act specifies that the standards issued by NHTSA will provide minimum performance requirements, it was probably unnecessary for Congress to include a savings clause for tort liability. By providing a minimum standard Congress foresaw that common law claims would seek to impose a higher duty of care upon the automobile industry. See, Chrysler Corporation v. Dept. of Transp., 472 F.2d 659, 670 (6th Cir. 1972); Sours v. General Motors Corporation, 717 F.2d 1518 (6th Cir. 1983); Federal Consumer Safety Legislation, Heffron, et al., 1970 pp. 22-23 (Common law can hold manufacturers liable for failing to exceed the federal minimum safety standards).

the several States, District of Columbia, Puerto Rico, Guam, the Virgin Islands, the Canal Zone and American Samoa -- 15 U.S.C. §1391(8)) should avoid issuing standards dissimilar to existing federal standards; allowing State governments to enact their own regulations would cause problems pertaining to enforcement and application. 2 U.S. Cong. & Admin. News. 66-55, p. 2720.[7] Congress stressed that these minimum standards were not intended to shield manufacturers from common law liability.

> "It is intended, and this subsection [108(c)] specifically establishes, that compliance with safety standards is not a defense or otherwise to affect the rights of parties under common law particularly those relating to . . . tort liability." House Committee Report No. 1776, p.24.

See also, 3 U.S. Cong. & Admin. News. 82-36, p. 3173. As early as 1969, the First Circuit Court of Appeals

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[7] The legislative history of the Act makes it evident that Congress could not have been referring to injury verdicts in personal injury actions. Senator Magnuson noted that "with the exception of a handful of State regulations and the Federal seat belt and brake fluid laws, the automobile sold . . . in interstate commerce is today subject to only the standards produced by the committees of the Society of Automotive Engineers." 112 Cong. Rec. 14221 (1966) (emphasis added). And Senator Mackay noted that one of the elements of the new federal role in automobile safety was "the definition and enforcement of national safety performance standards for all motor vehicles. Fifty State legislatures simply (emphasis added). See also, Edgar v. Fred Jones Lincoln-Mercury, etc., 524 F.2d 1962, 165 (10th Cir. 1975).

confirmed Congress' intent to only limit states from enacting inconsistent regulations.

> ". . . Section 103(d) of the act, 15 U.S.C. §1392(d) squarely confronts the question before us - the scope of federal preemption of the state motor vehicle safety standards. Reduced to its simplest terms, the import of §103(d) is that, except in the case of vehicles purchased for their own use, the states are precluded from enacting non-identical standards where there is a federal standard relating to the same aspect of performance in existence." Chrysler Corp. v. Rhodes, 416 F.2d 319, 321 (Emphasis added)

The common law is free to require more than the minimum safety provided by these standards. This conclusion was made perfectly clear in the very first case deciding that NHTSA has the authority to issue a minimum standard for restraint systems. Chrysler Corporation v. Dept. of Transportation, 472 F.2d 659 (6th Cir. 1972). Once this type of standard becomes effective, the

> ". . . validity of that standard is capable of being placed in issue in litigation in any of a number of ways." 472 F.2d at 670.
>
> "[W]e note that 15 U.S.C. §1397(c) expressly preserves all common law liability with respect to compliance with any Federal motor vehicle safety standard. . . . [C]ompliance with Federal standards is not a defense to a product's liability action for failure to use reasonable care in design. . ." 472 F.2d at 670 n.13. (Emphasis added)

Federal standards do not presume to lay down a template for proper design. Sours v. General Motors Corporation, 717 F.2d 1511, 1518 (6th Cir. 1983). The purpose of §1397(c) was to disclaim any intent to preempt state common law in the automotive design area. Dorsey v. Honda Motor Company, Ltd., 655 F.2d 650, 654, 656 (5th Cir. 1981). There is a drastic difference between the preemption clause (§1392(d)) establishing standards which State and local governments cannot override, and the savings clause (§1397(c)) preserving an injured parties' common law tort remedies regardless of the promulgation of federal standards. See Knippen v. Ford Motor Company, 546 F.2d 993, 1000 (D.C. Cir. 1976); United States v. General Motors Corp., 518 F.2d 420, 434 (D.C. Cir. 1975).

When it enacted the Safety Act, Congress was fully aware that it was legislating in an area previously governed only by state law. For that reason, Congress explicitly addressed what it did and did not intend to preempt in two separate sections of the Act. The first section, 15 U.S.C. §1392(d), **which is labelled the "Preemption section"** explained the preemptive effect that Congress intended the federal motor vehicle safety standards to have on state and local safety standards. The portion relevant to this appeal provides as follows:

> "Section 1392(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment for any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the

> Federal standard."

Congress, however, did not stop with §1392(d). It added 15 U.S.C. §1397(c), which **expressly** stated the effect that Congress intended the federal motor vehicle safety standards to have on common law claims. This section provides in its entirety as follows:

> "Continuation of common law liability
>
> Section 1397(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

Given the unequivocal language of these two sections, Congress's intent is clear. Section 1392(d) preempts state and local standards, and §1397(c) expressly preserves all common law claims. Section 1392(d) has nothing to do with common law claims; it applies to "state standards." Common law claims are not preempted.

Normally, the plain and unequivocal language of 15 U.S.C. §1397 would preclude further analysis. See, e.g., TVA v. Hill, 437 U.S. 153, 184 N.29 (1984). But, if one looks to the Acts's legislative history, it only confirms this interpretation.

C. The Legislative History Shows There Is No Preemption.

The Senate's version of the proposed Safety Act did not contain §1397(c), but did contain §1392(d). Despite that fact, the Senate Committee Report made it clear that compliance with federal standards would not preempt common law claims. It stated:

"The Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law."
S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966).

This was not good enough for the House of Representatives, and so it added §1397(c). If the simple words of that section leave any doubts as to Congress's **express** intent to preserve all common law claims, those doubts are surely resolved by the House Committee Report:

"Common law liability - §108(c) of the reported bill [15 U.S.C. §1397(c)] provides that compliance with any Federal motor vehicles safety standard does not exempt a person from any liability under common law.

It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 1776, 89th Cong. 2d Sess. 24(1966).

Finally, what prompted the House of Representatives to insert §1397(c), and make Congress's intent to preserve all common law claims undeniably clear, was the Congressional testimony of Tim Triplett. He said:

"We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the

manufacturer of his natural responsibility for the performance of his product.

You many think that the manufacturer is afraid of Government regulations but the cry you are hearing may be "Briar Fox, please don't throw me in the briar patch." If the government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets the Government standards," and an already compounded problem will be recompounded. "Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, ("Safety Act Hearing"), 89th Cong. 2d Sess. Part 2, 1249 (1966).

The legislative history of the Safety Act demonstrates that, in the words of Silkwood v. Kerr-McGee Corp., 64 U.S. 238, 264, (1984) (Dissenting Opinion): "Congress intended to rely solely on federal expertise in setting safety standards, and rely on . . . juries to remedy whatever injury takes place". Even though there may be "tension between the conclusion that safety regulation is the exclusive concern of federal law and the conclusion that a State may nevertheless award damages based on its own law of liability" (Id. at 256), Congress did not believe it was inconsistent to vest NHTSA with regulatory authority to enact motor vehicle performance standards, while at the same time allowing plaintiffs to recover for injuries caused by defective motor vehicle design. Cf., Id., at 256 and

Because "the purpose of Congress is the ultimate touchstone of the preemption inquiry," California Federal Savings and Loan Association v. Guerra, 479 U. S. 272, 280 (1987), whether a particular state law is preempted can only be determined by a careful review of the applicable federal statute. This was the situation confronting the Court in Guerra, in deciding whether title VII of the Civil Rights Act preempted California's pregnancy leave statute. The Court based its analysis on the express language that Congress used in the preemption provision (or, as Justice Scalia described them, "anti-preemption provisions". As Justice Marshall explained for the majority, "there is no need to infer congressional intent to preempt state laws" because Congress stated its intention in two separate parts of the Civil Rights Act. Id. at 280. Similarly, in California Coastal Commission v. Granite Rock Company, 107 S. Ct. 1419 (1987), the Court refused to embark on an implied preemption analysis to interpret the Coastal Zone Management Act. Justice O'Connor wrote for the Court, 107 S. Ct. at 1430-31:

> "Congress has provided several clear statements of its intent regarding the preemptive effect of the CZMA; those statements which indicate that Congress clearly intended CZMA not to be an independent cause of pre-emption except in cases of actual conflict, end our inquiry . . . Because Congress specifically disclaimed any intention to preempt pre-existing state authority in the CZMA, we conclude that even if all federal lands are excluded from the CZMA definition of 'coastal zone', the CZMA does not automatically preempt all

state regulation of activities on federal lands."

This refusal to wander into the speculative waters of implied preemption makes eminent sense. If, as is universally recognized, the issue of preemption is always one of congressional intent, then the question of what is preempted on a given subject is found in the statute. It is one thing for courts to try to divine congressional intent from the overall operation of a statute and its legislative history when Congress has been silent, but it is quite another to do so when Congress has included specific provisions, as it did here in 15 U.S.C. §§1392(d) and 1397(c), expressly addressing what it did and did not intend to preempt. Such unnecessary quests for "congressional intent" cause courts to engage in the kind of speculative balancing of interests which they claim Congress engaged in, but somehow left out of the preemption portion of the statute. Such a process inevitably thrusts courts into a quasi-legislative role, a function for which there is no justification when Congress has spoken on the subject. In the Safety Act, Congress plainly and expressly stated its intent to preserve common law claims. That being so, they cannot be impliedly preempted. Loulos v. Ford Motor Company, supra.

D. Cipollone and the Safety Act's Express Preservation of Common Law Claims Precludes a Finding of Express Preemption and Any Implied Preemption Analysis.

This Court in Cipollone prescribed that the preemptive scope of federal legislation is governed by the express language contained in a preemption clause -- when one is written by Congress. In reviewing the effect of Congress preempting State warning requirements and the

continued vitality of State common law damages actions, the Court observed that there is no inherent conflict between these two propositions. In fact, the Court implicitly acknowledged the propriety of allowing both (through legislative fiat or judicial analysis) by referencing legislative provisions of the Comprehensive Smokeless Tobacco Health Education Act of 1986; that Act contained both a preemption section (of State or local regulations prohibiting or imposing upon manufacturers the obligation to include statements about smokeless tobacco products and health) and a Savings Clause for common law action.

Given the unequivocal language of the Savings Clause in the Motor Vehicle Safety Act of 1966, and this Court's insistence on reviewing Congress' language closely for analysis of what is and what is not preempted by federal legislation, the existence of 15 U.S.C. §1397(c) is determinative. A direct analogy between the rationale in Cipollone and the legislation under review here demonstrates the validity of our position.

The 1965 Cigarette Act preemption provision stated: "No statement relating to smoking and health shall be required in the advertising of cigarettes." It was observed that this provision prohibited state and federal rule-making bodies from mandating particular cautionary statements. Cipollone, 112 S. Ct. 2619. The Court observed that this reading of the preemptive statement in the Act was confirmed by looking at the statement of purpose of the 1965 Act -- i.e., to avoid diverse, nonuniform and confusing labeling and advertising regulations. For these reasons, the Court ruled that the preemption provisions of the 1965 Act only preempted state and federal rule making bodies from prescribing certain cautionary statements, and it did not preempt common law damage actions. Cipollone, Id.

As we, and almost every court which has studied the 1966 Motor Vehicle Safety Act has observed, the preemption clause of the Safety Act confirms Congress' intent to provide for the avoidance of State and political sub-division government rule making bodies from mandating vehicle performance standards not identical to the federal standards. In neither the 1965 Cigarette Act nor the 1966 Safety Act is there any express provision to preempt common law damage claims related to negligent warning (of Cigarette use risks) or design defect or negligent design of motor vehicles. Because these two pieces of federal legislation so closely mirror each other in their verbiage and intent, the conclusion that common law actions are not preempted for one should equally apply to the other.

E. Plaintiff's Claim Is Not Expressly Preempted Based upon Cipollone.

The Petitioner and their Amici argue that there is express preemption, and that every federal appellate court which decided that question against the automobile manufacturers before and after Cipollone is in error. Thus, they reargue the contention that common law claims are "standards" as that word is used in the "preemption" section of the Safety Act. While we would believe that mere reference to the hundreds of reported appellate court decisions previously construing this language to not include common law design claims would be enough to put this argument to rest, we will not stop there. To truly understand the express scope of preemption in the context of motor vehicle safety, this Court must look to all Congressional statements of intent. For this reason, the Missouri Court of Appeals recently rejected preemption and, relying in part on the decision of the Eleventh Circuit Court of Appeals in Myrick, stated as follows:

"'[I]n the Safety Act, Congress put its statements about pre-emption in two statutory provisions, one of which we refer to as a pre-emption clause (1392(d)) and the other one of which we call a savings clause (1397(k)). Our terminology notwithstanding, both of the clauses are pre-emption provisions in the material sense of the word, because both clauses explicitly deal with the subject of what is and is not preempted.'

"This analysis is consistent with a basic rule of statutory construction that legislative intent is discerned by examining a statute's provisions as a whole. . . .

* * *

"Clearly, Congress mandated in 1397(k) that the Safety Act was not to serve as a shield to any liability under common law. . . ."

". . . We concur with the conclusion of the Myrick court that '[t]he legislative history demonstrates that the pre-emption provisions of the Safety Act, which include the savings clause, are a reliable indicium of congressional intent.'" Loulos v. Ford Motor Company, 1994 WL 226676 (May 1994).

F. Defendant's Argument that the Options of FMVSS 121 and 208 Require Implied Preemption Based on Conflict Analysis is Wrong.

Preemption is not to be inferred merely from the fact that Congress has authorized comprehensive federal

regulations of the field. New York State Dept. of Social Services v. Dubling, 93 S. Ct. 2507, 2514 (1973). Before a Court may find preemption, a sharp conflict must exist between state and federal law. If the Act itself does not expressly warrant preemption of the plaintiff's common law claim, then certainly Congress did not expect -- when it saved the common law -- the federal regulations to preempt a cause of action. See, e.g., Silkwood, supra; Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1541-42 (D.C. Cir. 1984). It is equally important to note that never in the convoluted history of regulations such as FMVSS 121 and 208 has NHTSA stated that compliance with any of the options in these regulations would preempt common law liability. As she announced her intention to encourage the "development and availability [of airbags] through appropriate incentives" (49 Fed. Reg. at 28963), Secretary Dole also noted that:

> "[a]nother potential source of manufacturer liability was raised by Stephen Teret, representing the National Association for Public Health Policy:
>
> 'If a reasonable means of protection is being denied to the motoring public, the denial should lead to liability, even if the liability can be imposed on each and every car manufacturer. People whose crash injury would have been averted had the car been equipped with an air bag can sue the car manufacturer to recover the dollar value of the injury.'" Id. at 28972.

NHTSA's silence about preemption strongly bolsters the conclusion that FMVSS 121 and 208 were issued to provide a minimum level of performance. Cf., Chrysler Corporation

v. Rhodes, supra, 416 F.2d 323. In California Com'n v. Granite Rock Co., 107 S. Ct. 1419, 1426 (1987), the Court recounted the principle that preemption will not be imposed when federal regulations are devoid of any expression of intent to preempt.

The defendant argues that NHTSA's promulgation of options constitutes a form of federal preemption. That argument has no merit. In Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 102 S. Ct. 3014 (1984) -- the case relied upon for this argument -- there was an unequivocal expression that the federal agency intended to preempt state law by providing banks with the option to exercise due-on-sale clauses. Id. at 3025. To the contrary, in this case, neither Congress nor NHTSA has expressed any interest in displacing state common law because of the FMVSS options. It is easy to understand NHTSA's silence because federal safety standards do not set forth design standards. For instance, under FMVSS 121 and 208 NHTSA has promulgated regulations requiring at a minimum the manufacture of vehicles with one of several types of brake systems and one of several types of restraint systems, but the regulations do not dictate what safety features are required to satisfy the manufacturers' common law duty of care--i.e., FMVSS 208 does not state the manner of construction, nor does it establish what is necessary to make each vehicle safe. State law, which may impose liability upon a manufacturer for producing a defective vehicle is not, therefore (1) an identical area of regulation, nor (2) does it establish a contrary imposition or obligation upon the manufacturer.

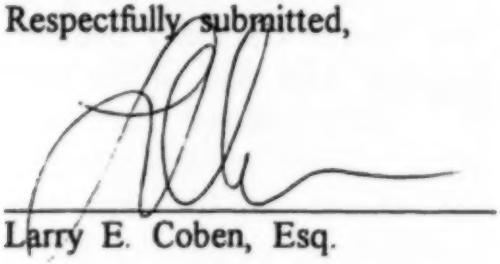
G. A Finding of Preemption Will Allow Vehicle Manufacturers to Escape Liability for Defective Products That Directly Cause Injury.

The relief requested by the Petitioner and its Amici would, undoubtedly, cloak motor vehicle manufacturers with immunity that is neither fair nor intended by the Safety Act. A few examples will, we hope, suffice. In the mid-1970s, Ford Motor Company marketed the Ford Pinto. This car complied with one of the performance options of FMVSS 301, which obliged Ford to design and manufacture the vehicle so that its fuel system would not leak in a 30 mph rear barrier impact test; the Pinto met that standard. Nevertheless, consumers had every right to challenge the design of that product when they or their loved ones became involved in a fiery crash. Likewise, every car sold in this country by American manufacturers between 1975 and 1989 complied with FMVSS 208 by installing a lap belt only system in the rear seat. That installation satisfied one of the options of the latter standard. Nevertheless, the use of a lap belt only can, under forseeable circumstances, cause catastophic injury -- which was avoidable by the installation of lap and shoulder belt systems marketed by American manufacturers in their vehicles sold in other countries during this same time period. Should manufacturers be held accountable for neglecting the design of cars in this country because they complied with bare minimum safety standards? Would such immunity further or retard the express purpose of the Safety Act? We believe the answer is very obvious. Congress never intended to immunize manufacturers from liability when it passed the Safety Act.

H. Conclusion

The Institute For Injury Reduction respectfully submits that the Court should affirm the Eleventh Circuit's decision, and put to rest the contention that Congress intended to immunize motor vehicle manufacturers from the common law because of compliance with applicable federal minimum standards. Safety depends on it.

Respectfully submitted,



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